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No. 99-1257

IN THE

Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS AMERICAN TRUCKING ASSOCIATIONS, INC., CHAMBER OF COMMERCE OF THE UNITED STATES, *ET AL.**

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly rejected the Environmental Protection Agency's ("EPA's") standardless interpretation of Sections 108 and 109 of the Clean Air Act ("the Act").

2. Whether the Court of Appeals acted within its jurisdiction in reviewing, as a final agency action ripe for review, EPA's ruling that it can implement a revised National Ambient Air Quality Standard ("NAAQS") for ozone pursuant to its general implementation authority under Section 172 of the Act, notwithstanding Congress' enactment of a specific implementation schedule for the ozone NAAQS in Section 181 of the Act.

3. Whether the Court of Appeals correctly held that the specific classifications and attainment dates set forth in Section 181 of the Act for the ozone NAAQS take precedence over EPA's general authority to devise classifications and attainment dates for the various NAAQS pursuant to Section 172 of the Act.

RULE 29.6 STATEMENT

The respondents joining this brief are: American Trucking Associations, Inc., Chamber of Commerce of the United States, National Coalition of Petroleum Retailers, Burns Motor Freight, Inc., Garner Trucking, Inc., Genie Trucking Line, Inc., National Automobile Dealers Association, National Association of Manufacturers, National Small Business United, The American Portland Cement Alliance, The Glouster Company, Inc., Non-Ferrous Founders' Society, Equipment Manufacturers Institute, American Farm Bureau Federation, and American Road and Transportation Builders Association.

None of these respondents has any parent corporations, and no publicly traded company owns 10 percent or more of any of these respondents' stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

PERTINENT STATUTORY AND REGULATORY PROVISIONS 2

COUNTERSTATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. NONDELEGATION CONCERNS REINFORCE THAT THE CLEAN AIR ACT REQUIRES A COMMON SENSE BALANCING OF COMPETING FACTORS IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS 7

A. The Administrator, Bound by *Lead Industries*, Effectively Concedes Here the Absence of the Sort of Intelligible Principle Previously Accepted by This Court in Ratemaking and Similar Cases Presenting Questions of Degree 11

B. The Administrator Cannot Escape Her Concession That There Was No Intelligible Principle Here by Attempting to Rewrite the Record 15

C. Repudiating *Lead Industries* and Requiring Consideration of Competing Factors in Setting NAAQS Will Supply the Missing Intelligible Principle and Resolve the Nondelegation Problem 21

II. THE COURT OF APPEALS' IMPLEMENTATION HOLDING IS CORRECT, BUT NEED NOT BE REACHED BY THIS COURT. 25

A. The Court of Appeals Correctly Held that Subpart 2 Applies to Implementation of All Ozone NAAQS, Including Revised Ozone NAAQS, Thus Effectively Precluding Implementation of the Ozone NAAQS Under Review Here 25

1. The Text of Subpart 2 Unambiguously Encompasses Implementation of All Ozone NAAQS 26

2. The Statutory Structure and Legislative History Confirm that Subpart 2 Governs Implementation of All Ozone NAAQS 32

3. Congress' Carefully Crafted Statutory Regime Does Not "Lead to Unworkable and Absurd Results." 38

B. Although the Subpart 2 Issues Are Ripe for Review, The Court Nonetheless May Decline to Decide Them 41

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases:

Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally, 337 F. Supp. 737 (D.D.C. 1971) 23, 24

American Lung Ass'n v. EPA, 134 F.3d 388 (D.C. Cir. 1998) 17

American Power & Light Co. v. SEC, 329 U.S. 90 (1946) 10, 12

Association of Inv. Brokers v. SEC, 676 F.2d 857 (D.C. Cir. 1982) 46

AT&T Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1993) 44

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Boston Tow Boat Co. v. United States, 321 U.S. 632 (1944) 47

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 17

California v. Rooney, 483 U.S. 307 (1987) 47, 48

Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) 26, 45

Christensen v. Harris County, 120 S. Ct. 1655 (2000) 22

City of Santa Rosa v. EPA,
534 F.2d 150 (9th Cir.), *vacated sub nom. Pacific Legal Found. v. EPA*,
429 U.S. 990 (1976) 36

Clinton v. City of New York,
524 U.S. 417 (1998) 10

Coalition for Clean Air v. Southern Cal. Edison Co.,
971 F.2d 219 (9th Cir. 1992) 37

Dole v. United Steelworkers of Am.,
494 U.S. 26 (1990) 32

EPA v. Brown,
431 U.S. 99 (1977) 36

Ethyl Corp. v. EPA,
541 F.2d 1 (D.C. Cir. 1976) 20

Fahey v. Mallone,
332 U.S. 245 (1947) 10

FDA v. Brown & Williamson Tobacco Corp.,
120 S. Ct. 1291 (2000) 22

FEA v. Algonquin SNG, Inc.,
426 U.S. 548 (1976) 9

FPC v. Hope Natural Gas,
320 U.S. 591 (1944) 4, 13, 14, 16

Hahn v. United States,
524 U.S. 236 (1998) 46

Hoctor v. United States Dep't of Agric.,
82 F.3d 165 (7th Cir. 1996) 13

ICC v. Goodrich Transit Co.,
224 U.S. 194 (1912) 14

Industrial Union Dep't v. American Petroleum Inst.,
448 U.S. 607 (1980) 6, 9, 23

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 36

International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA,
938 F.2d 1310 (D.C. Cir. 1991) 3, 6, 22, 23

J.W. Hampton & Co. v. United States,
276 U.S. 394 (1928) 10, 13, 16

Kent v. Dulles,
357 U.S. 116 (1958) 12

Lichter v. United States,
334 U.S. 742 (1948) 14

Loving v. United States,
517 U.S. 748 (1996) 8

Mahoney v. Babbitt,
113 F.3d 219 (D.C. Cir. 1997) 46

MCI v. AT&T,
512 U.S. 218 (1994) 22

Mistretta v. United States,
488 U.S. 361 (1989) 8-10, 23

Montana v. Crow Tribe of Indians,
523 U.S. 696 (1998) 46

Morales v. Trans World Airlines, Inc.,
504 U.S. 374 (1992) 26, 31

Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 23

National Cable Television Ass'n v. United States,
415 U.S. 336 (1974) 10, 23

New York Trust Co. v. Eisner,
256 U.S. 345 (1921) 38

Pearson v. Shalala,
164 F.3d 650 (D.C. Cir. 1999) 17

Pennsylvania Dep't of Corrections v. Yeskey,
524 U.S. 206 (1998) 31

SEC v. Chenery Corp.,
332 U.S. 194 (1947) 18

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 46

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381 (1940) 14

Texas v. Hopwood,
518 U.S. 1033 (1996) 47

Touby v. United States,
500 U.S. 160 (1991) 12

United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.,
282 U.S. 311 (1931) 12

Webster v. Doe,
486 U.S. 592 (1988) 12

Williams Gas Processing-Gulf Coast Co. v. FERC,
145 F.3d 377 (D.C. Cir. 1998) 47

Yakus v. United States,
321 U.S. 414 (1944) 8, 14

Statutes:

Administrative Procedure Act,
5 U.S.C. § 551(4) 12

Administrative Procedure Act,
5 U.S.C. § 551(6) 12

Clean Air Act § 107(b-d),
42 U.S.C. § 7407(b-d) 26

Clean Air Act § 107(d)(1)(A),
42 U.S.C. § 7407(d)(1)(A) 28

Clean Air Act § 107(d)(1)(A)(iii),
42 U.S.C. § 7404(d)(1)(A)(iii) 39

Clean Air Act § 107(d)(1)(B)(i),
42 U.S.C. § 7407(d)(1)(B)(i) 28

Clean Air Act § 107(d)(4)(A)(i),
42 U.S.C. § 7407(d)(4)(A)(i) 31

Clean Air Act § 109(d)(1),
42 U.S.C. § 7409(d)(1) 39

Clean Air Act § 110(a)(2)(A),
42 U.S.C. § 7410(a)(2)(A) 36

Clean Air Act § 116,
42 U.S.C. § 7416 40

Clean Air Act § 172(a)(1, 2),
42 U.S.C. § 7502(a)(1, 2) 37

Clean Air Act § 172(a)(1)(A),
42 U.S.C. § 7502(a)(1)(A) 26, 27, 30

Clean Air Act § 172(a)(1)(C),
42 U.S.C. § 7502(a)(1)(C) 27, 30

Clean Air Act § 172(a)(2)(A),
42 U.S.C. § 7502(a)(2)(A) 27

Clean Air Act § 172(a)(2)(D),
42 U.S.C. § 7502(a)(2)(D) 27

Clean Air Act § 181(a)(1),
42 U.S.C. § 7511(a)(1) 27, 28, 33, 37, 41

Clean Air Act § 181(a)(4, 5),
42 U.S.C. § 7511(a)(4, 5) 34

Clean Air Act § 181(b)(1),
42 U.S.C. § 7511(b)(1) 34

Clean Air Act § 181(b)(2, 4),
42 U.S.C. § 7511(b)(2, 4) 34

Clean Air Act § 181(b)(4)(D),
42 U.S.C. § 7511(b)(4)(D) 33

Clean Air Act § 181(c)(3),
42 U.S.C. § 7511(c)(3) 40

Clean Air Act § 182,
42 U.S.C. § 7511a 34

Clean Air Act § 182(c)(5),
42 U.S.C. § 7511a(c)(5) 34

Clean Air Act § 182(e)(3),
42 U.S.C. § 7511a(e)(3) 34

Clean Air Act § 183(g),
42 U.S.C. § 7511b(g) 33

Clean Air Act § 185,
42 U.S.C. § 7511d 34

Clean Air Act § 186(a),
42 U.S.C. § 7512(a) 32

Clean Air Act § 186(a)(1),
42 U.S.C. § 7512(a)(1) 29

Clean Air Act § 188(a)(1),
42 U.S.C. § 7513(a)(1) 29

Clean Air Act § 191(a)(1),
42 U.S.C. § 7514(a)(1) 29

Pub. L. 95-95, 91 Stat. 691 (Aug. 7, 1977) 37

Pub. L. 101-549, 104 Stat. 2339,
§ 711(b) (Nov. 15, 1990) 40

U.S. CONSTITUTION, Art. I, § 1 7

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Miscellaneous:

36 Fed. Reg. 8,186 (Apr. 30, 1971) 36

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H.R. 3030, 101st Cong. § 104 (1989),
reprinted in II Senate Comm. on Env. and
Public Works, 103d Cong.,
Legislative History of the Clean Air
Act Amendments of 1990 (1993) 32, 35

H.R. Rep. No. 101-490, pt. 1, at 145-48 (1990),
reprinted in II 1990 Legislative History 33

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reprinted in III 1990 Legislative History 35, 36

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reprinted in V 1990 Legislative History 33, 38

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WORKS OF THOMAS JEFFERSON (P. Ford ed. 1904) 8

INTRODUCTION

The constitutional scholar Thomas Reed Powell has said, "if you can think about something that is related to something else without thinking about the thing to which it is related, then you have the legal mind." Quoted in Lon Fuller, THE MORALITY OF THE LAW 4 (rev. ed. 1964). The Administrator's brief is a stunning display of the legal mind. The D.C. Circuit's holding that the Administrator's ozone and particulate matter ("PM") National Ambient Air Quality Standards ("NAAQS") violated the Constitution depended upon—indeed, was inextricably bound up in—the *Lead Industries* doctrine that says she may not consider costs and other non-health factors in setting those standards. Yet, the Administrator's brief nowhere even mentions the relationship of that doctrine to the nondelegation holding below. That omission is telling, for it was only the frank irrationality of *Lead Industries* which produced the constitutionally fatal indeterminancy in the Administrator's exercise of her authority.

The Administrator points to many aspects of the Clean Air Act ("CAA" or "Act")—particularly the elaborate procedures she must follow and the consultation she must engage in before setting standards, and the statutory injunction that she is to set those standards at levels "requisite to protect the public health" with an "adequate margin of safety." Understood in a natural and reasonable way as explained in our brief as cross-petitioners, this statutory text provides a level of specificity that may be deemed constitutionally adequate under this Court's decisions. But the Administrator, constrained by *Lead Industries*, does not (and may not) understand those terms in a natural and reasonable way. Without the bizarre gloss of *Lead Industries,* those criteria would make quite enough noise to register on constitutional ear drums. But constrained by *Lead Industries*, they make as much noise as one hand clapping. The Court of Appeals reached its conclusion only because, if the Act is interpreted to include a prohibition on considering costs (including costs to health), terms like "requisite to protect the public health" and "adequate margin of safety" are not just

vaguer and less determinate than they might be—they are demonstrably, and as a matter of logic, wholly indeterminate. This is, therefore, a rare, perhaps unique case in the jurisprudence of the constitutional delegation doctrine. It is that rare case where the general terms of the delegation have been rendered meaningless by the lower court. And it is only because of *Lead Industries* that this is so. Because she refuses to come to grips with that fundamental fact, the Administrator's brief is quite literally beside the point.

The Administrator also complains in Part I.B of her brief that the Court of Appeals, in remanding the case to her, misused the nondelegation doctrine to achieve inappropriate judicial oversight of her administrative prerogatives. On the premise that *Lead Industries* states the definitive interpretation of the Act, the court below was correct that the Act provides the Administrator no coherent guidance and therefore violates the Constitution. Perhaps the Court of Appeals might have left it at that, but, keeping in mind the teachings of *Chevron*, that court cautiously remanded to the Administrator so that she could have a last opportunity to attempt a constitutional interpretation. Certainly the lower court should not be faulted for taking such a deferential stance. But if, as we request in our brief as cross-petitioners, this Court finally dispatches the misbegotten *Lead Industries* doctrine, the Administrator would also be free to set new ozone and PM standards, albeit free of the entirely irrational constraints of *Lead Industries*. In short, the Court of Appeals, though hobbled by *Lead Industries*, employed an entirely conventional remedy under the circumstances.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions that are central to the Administrator's NAAQS standard-setting authority are set forth in the Appendix to our cross-petitioners brief. *See* Cross-Pet. App. 1a-16a. The portions of the Clean Air Act central to the Subpart 2 issues are set forth in the Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

Respondents rest on the Statement provided in their brief as cross-petitioners. *See* Cross-Pet. Br. 2-25. The orders and opinions below and the bases of this Court's jurisdiction are found at page 2 of that brief.

SUMMARY OF THE ARGUMENT

Lead Industries spawned the nondelegation holding below. Under the governance of *Lead Industries,* the Administrator had but two options when setting the ozone and PM NAAQS: she could adopt a "zero-risk policy" setting the "permissible levels of both pollutants here at zero" *or* she could select a non-zero standard without considering the relevant factors that might counsel in favor of or against any particular NAAQS. *See* Pet. App. 15a; Cross-Pet. Br. 29. The Court of Appeals recognized that the nondelegation concerns presented by each of these options would disappear if the Administrator were only able to employ "cost-benefit analysis," which that court had defined in an earlier case as "'only a systematic weighing of the pros and cons.'" Cross-Pet. Br. 30 (quoting *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310, 1321 (D.C. Cir. 1991) ("*Lockout/Tagout I*")). And, while remanding to the Administrator in light of *Chevron*, the Court of Appeals nonetheless expressed doubt that any constitutional interpretation of the statute was possible under the *Lead Industries* doctrine. *See* Pet. App. 18a.

Several of this Court's recent decisions, though not expressly predicated on nondelegation concerns, would appear to rule out both available options discussed by the Court of Appeals (a zero-risk standard or an arbitrarily-selected non-zero standard) and thus doom *Lead Industries*. *See* Cross-Pet. Br. 25, 31-32, 47. The Act's text, structure and purpose likewise

confirm that *Lead Industries* was wrongly decided. *See id.* at 32-43. The correctness of that conclusion is reinforced both by the need for transparency in the agency decisionmaking process, *see id.* at 43-47, and by the requirements of effective executive, congressional and judicial oversight of the Environmental Protection Agency's ("EPA's" or "the Agency's") standard-setting, *see id.* at 47-50.

For all of these reasons, it is simply impossible to consider the Court of Appeals' nondelegation holding in isolation from *Lead Industries*. With that reservation stated, we nonetheless demonstrate below that the reasoning of the Court of Appeals both underscores the error of *Lead Industries* and stands as an independent basis for reversing EPA's ozone and PM NAAQS.

The nondelegation doctrine flourishes in the soil of constitutional bedrock. It requires, especially in cases involving regulations that affect the whole economy, that the elected Congress provide an "intelligible principle" governing the exercise of unelected agency officials' discretion. Here, however, the Administrator disclaimed any need to accept a governing principle at all, saying instead that her NAAQS decisionmaking was "largely judgmental in nature" and reflected "no generalized paradigm," thus conceding the absence of the requisite intelligible principle. *See* 62 Fed. Reg. 38,652, 38,688 (July 18, 1997); 62 Fed. Reg. 38,856, 38,883 (July 18, 1997). Her refusal under the *Lead Industries* doctrine to weigh competing factors also cannot be squared with this Court's nondelegation precedents which presuppose a balancing of logically relevant factors in ratemaking and similar contexts in which questions of degree must be administratively resolved. *See, e.g., FPC v. Hope Natural Gas*, 320 U.S. 591, 603 (1944) ("[T]he fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."). *See* Part I.A, *infra*.

The Administrator has no answer to these points other than to say that Congress imposed multiple specific restrictions on

EPA—for instance, "a body of experts that EPA is to consult and procedures that EPA must follow"—and that the court below somehow demanded that "EPA demonstrate that the numerical standard the agency selected was the sole possible choice." EPA Br. 25, 30. These are red herrings. The "intelligible principle" requirement means a *substantive* constraint on the agency's exercise of discretion, not simply a *procedure* to follow, even though that constraint need not be (and usually is not) a rule that preordains the selection of a unique outcome. All that is required is a standard against which the agency's exercise of discretion can be tested—for example, the balancing of relevant factors in *Hope Natural Gas*, or the "systematic weighing" of competing considerations (including costs) that the Act requires here. *See* Cross-Pet. Br. 30, 32-50. By contrast, the Administrator consistently disclaimed "any single approach" below and argued that everything depends "upon the particular circumstances confronting her in a given NAAQS review." 62 Fed. Reg. at 38,688, 38,883. But such purely *ad hoc* decisionmaking provides no intelligible principle and leads inevitably, as here, to "minimally informative generalities" that do "not explain[], in concrete terms, why [she] chose one level of regulation rather than another." Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich. L. Rev. 303, 327, 330 (1999). The Administrator perhaps belatedly recognizes this fatal flaw, as she hints that she wishes that it were possible to find a guiding principle by characterizing both ozone and PM as "threshold" pollutants. *See* EPA Br. 31. In fact, the record is clear that EPA made no such findings below, *see* Cross-Pet. Br. 6-7 (ozone), 14-16 (PM), a point the Administrator herself repeatedly underscored in both the rulemakings themselves and her D.C. Circuit briefing. *See, e.g.*, Resp. Br. in D.C. Cir. No. 97-1440, at 34, 119 (PM standards, like ozone standards, "could not be risk-free" and "cannot eliminate all risk to public health."). *See* Part I.B, *infra*.

As the D.C. Circuit recognized in *Lockout/Tagout I*, no more than the "prudential algebra" of Ben Franklin—"a systematic weighing" of competing considerations (including costs)—is required to resolve the nondelegation problems identified below. *See* 938 F.2d at 1321. That outcome, required by the Act for the reasons detailed in our brief as cross-petitioners, would obviate any need for aggressive judicial construction (as in *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) ("*Benzene*")), while leaving EPA with a wide scope of discretion in setting NAAQS. The Court of Appeals' remand remedy, though fashioned within the shackles of *Lead Industries*, appropriately recognized that the Agency should decide in the first instance interpretative issues not resolved by Congress. Accordingly, once *Lead Industries* is rejected, many issues (apart from the central question of whether the Act requires a balancing of competing factors in setting NAAQS) will remain for EPA to resolve in the next round of ozone and PM rulemakings. *See* Part I.C, *infra*.

The Court of Appeals' Subpart 2 implementation holding is also correct, even though the Court may elect not to reach it. Congress enacted the detailed Subpart 2 classifications, attainment dates and control strategies for the ozone NAAQS precisely in order to deprive the Administrator of the implementation discretion her predecessors had previously exercised (so unsatisfactorily in Congress' view) over the previous two decades. The plain language, structure, drafting history and context all confirm that Subpart 2's long-term blueprint for bringing the Nation into ozone attainment was meant to last—certainly it is not the "drafting error that the EPA's interpretation implies." Pet. App. 39a. *See* Part II.A, *infra*. The Subpart 2 issue was also unquestionably ripe for decision by the Court of Appeals, since the Administrator promulgated her final decision on Subpart 2 as a key element of the rulemaking. *See* Part II.B.1, *infra*. Nonetheless, this Court may properly elect not to address the Subpart 2 issue for

the quite different reason that the Administrator's arguments go to the rationale of the decision below—not its ultimate result. *See* Part II.B.2, *infra*.

ARGUMENT

The argument presented in this brief is necessarily provisional. As detailed in our brief as cross-petitioners, *Lead Industries* was wrongly decided, and the Act requires a weighing of competing factors in setting NAAQS. That required weighing of factors is all that is needed for those provisions of the Act to pass constitutional muster. Nonetheless, the arguments presented below serve to deepen the reasons why *Lead Industries* is wrong and provide an alternative basis for decision if the Court were to affirm the *Lead Industries* doctrine. Part II below separately addresses the so-called Subpart 2 implementation issue and shows why the Court of Appeals' resolution of that issue was both fundamentally right and ripe for decision.

I. NONDELEGATION CONCERNS REINFORCE THAT THE CLEAN AIR ACT REQUIRES A COMMON SENSE BALANCING OF COMPETING FACTORS IN SETTING NATIONAL AMBIENT AIR QUALITY STANDARDS.

While the issue may become academic if this Court rejects *Lead Industries*, the nondelegation doctrine is far more substantial and nuanced than the Administrator's brief pretends. The Constitution provides that "*[a]ll* legislative powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. Art. I, § 1 (emphasis added); *see also id.* § 8, cl. 17 ("The Congress shall have Power To . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers"). The first three Articles thus carefully distinguish between "legislative powers," Art. I, § 1, "executive power," Art. II, § 1, and "judicial power," Art. III, § 1, and divide them separately among the three

branches. The resulting rule forbidding delegations of legislative power—the nondelegation doctrine—reflects the "central judgment of the Framers of the Constitution that, within our political scheme, the separation of government powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). As Madison warned, "'[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.'" THE FEDERALIST NO. 47, at 303 (Clinton Rossiter ed., 1961) (quoting Montesquieu; emphasis omitted). The resulting threats to liberty are not always obvious. *See, e.g.*, David Currie, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 125-34 (1995).

The Court has recognized nonetheless that this nondelegation principle must be tempered where it comes into tension with the Nation's paramount interest in having a government capable of meeting the needs of modern society. As Thomas Jefferson observed, "[n]othing is so embarrassing nor so mischievous in a great assembly as the detail of execution." 5 WORKS OF THOMAS JEFFERSON 319 (P. Ford ed. 1904). Thus, "[t]o burden Congress with *all* federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." *Loving v. United States*, 517 U.S. 748, 758 (1996) (emphasis added). Needless to say, however, this competing principle of governmental necessity has not eliminated the nondelegation doctrine, nor lessened the importance of the liberty concerns underlying its constitutional role.

The Court has often accepted broad delegations. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 422-23 (1944) (wartime price controls); *Loving*, 517 U.S. at 772-73 (delegation to

President of authority over armed forces); *Mistretta*, 488 U.S. at 379 (delegation to courts of authority over criminal sentencing); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559-60 (1976) (delegation to executive branch of authority to restrict imports threatening "to impair the national security"). But it has always done so with the caveat that laws enacted by Congress must contain some substantive intelligible principle constraining any exercise of agency discretion. This is the rare case where, because of *Lead Industries*, no such constraint is present.

Mistretta is the precedent the Administrator relies on most forcefully and frequently. *See* EPA Br. 21-25. Yet, it is strikingly inapposite. *Mistretta* upheld the Sentencing Reform Act of 1984, which empowers the United States Sentencing Commission to establish sentencing guidelines. That statute provided, first of all, that those guidelines "must be consistent with the pertinent provisions [of Title 18] and could not include sentences in excess of the statutory maxima." 488 U.S. at 375. Within these constraints, the Act directed the Commission to consider seven elaborate and confining criteria as a means of first, reducing the "serious disparities in sentences" detailed in the Senate Report, and then, formalizing the previously unfettered discretion of trial judges under the Title 18 limits. *Id.* at 365, 375. Finally, the Act supplemented these criteria with a number of specific directives requiring, for example, "a term of confinement at or near the statutory maximum for certain crimes" and "a substantial term of imprisonment [for] a third felony conviction." *Id.* at 376-77.

Broad delegations are most problematic under the Court's decisions where, as here, the delegatee agency issues regulations that drastically affect the whole economy. *See, e.g.*, *Benzene*, 448 U.S. at 645 (plurality opinion) ("it is unreasonable to assume the Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view"); *id.* at 675

(Rehnquist, J., dissenting) (statute failed to satisfy constitutional standards "[e]specially in light of the importance of the interests a stake"); *Fahey v. Mallone*, 332 U.S. 245, 250 (1947) (delegations conferring power over "unprecedented economic problems of varied industries" must be more precise than those regarding "a single type of enterprise"); *Clinton v. City of New York*, 524 U.S. 417, 487 (1998) (Breyer, J., dissenting) (delegation may be less precise where it does not concern "the entire economy"). The problematic character of such economy-wide delegations is further heightened where courts (as in *Lead Industries*) render otherwise constitutionally acceptable text meaningless, or where agencies seek to do likewise under an overly expansive reading of their own authority under this Court's *Chevron* doctrine. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999).

The verbal formula devised by the Court for dividing permissible from impermissible delegations is that Congress itself "shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [exercise delegated authority] is directed to conform." *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) (Taft, C. J.) (emphasis added). The required intelligible principle may be drawn not only from statutory text, but also from "the purpose of the Act, its factual background, and the statutory context." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). When such a principle is not apparent from these sources, the Court has not hesitated to "giv[e] narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7 (citing *Benzene* and *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) ("*NCTA*")).

As demonstrated below, the Administrator, bound as she was by *Lead Industries*, effectively concedes that no such intelligible principle governed her standard-setting here. All her attempts to manufacture such a principle before this Court

are doomed by the record below and by the fact that no constitutionally acceptable standard governing the exercise of discretion is possible without consideration of the competing factors barred from consideration by *Lead Industries*. By contrast, the nondelegation problem that produced the decision below is readily resolved by rejecting *Lead Industries* and allowing the Administrator to formulate new ozone and PM NAAQS constrained only by the requirement that she overtly and systematically consider all logically relevant factors in setting those standards.

A. The Administrator, Bound by *Lead Industries*, Effectively Concedes Here the Absence of the Sort of Intelligible Principle Previously Accepted by This Court in Ratemaking and Similar Cases Presenting Questions of Degree.

Perhaps understandably in light of *Lead Industries*, the Administrator consistently has refused to give any definite meaning to the key statutory terms, saying, for example, that she "is not limited to any single approach to determining an adequate margin of safety. . . ." 62 Fed. Reg. at 38,688, 38,883. Moreover, she admits that her decisions were "largely judgmental in nature" and did not follow any "generalized paradigm" such as determining "what risk is 'acceptable'" through quantification "or any other metric." *Id.* Before the Court of Appeals, she continued to insist that "nothing in the statute requires her to make *any* specific 'findings' or to structure her decisionmaking in *any* particular way." Resp. Br. in D.C. Cir. No. 97-1441, at 43 (emphasis added). Put most charitably, the Administrator did what she thought best.

But that is precisely what troubled the Court of Appeals. *See* Cross-Pet. Br. 28-30. Given *Lead Industries* and accepting her appraisal that it is "'possible, but not certain' that health effects exist" at every level, the Administrator's standard-setting criteria become entirely indeterminate unless she chooses "a standard of zero." Pet. App. 10a-12a (quoting 62

Fed. Reg. at 38,678). To our knowledge no official (at least none outside the foreign policy arena) has ever claimed such regent authority. *Compare Kent v. Dulles*, 357 U.S. 116 (1958); *Webster v. Doe*, 486 U.S. 592 (1988). Nor has such an assertion of authority ever been sustained—especially as applied in an economy-wide regulatory context—under this Court's decisions which require a substantive "standard," *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 282 U.S. 311, 324 (1931), or similar "constraint" on the agency's exercise of "discretion." *Touby v. United States*, 500 U.S. 160, 165 (1991).

It is not hard to perceive in this Court's nondelegation decisions a distinction between dichotomous (either/or) determinations (the sort that often result in an "order" under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(6)) and those agency determinations which have general and prospective effect (the sort that more typically produce "rules" within the APA's parlance, 5 U.S.C. § 551(4)). In the former category, the Court often has not expressly discussed the specific considerations that weigh on alternative sides of the question of whether a license should be granted or denied, or a specific practice permitted or forbidden. In *American Power & Light Company v. SEC*, for example, the Court assumed utility holding-company structures were permissible except in cases where they would "unduly or unnecessarily complicate the structure" or "inequitably or unfairly distribute voting power among security holders." 329 U.S. at 104. Without expressly addressing the factors that must be balanced in making that determination, the Court rejected a nondelegation challenge, saying that "these standards" derive "much meaningful content from the purpose of the Act, its factual background and the statutory context," and that "[f]rom these sources," as well as the "manifold evils revealed by the legislative investigations," "a veritable code of rules reveals itself for the Commission to follow." *Id.* at 104-05.

This Court's nondelegation decisions, however, reflect a greater need to weigh competing considerations when an agency is making determinations of prospective effect, especially ones involving setting numeric values, including rates, prices or import duties. No doubt, this greater need for consideration of competing factors derives in part from the fact that setting numeric levels is quintessentially "legislative." *Cf. Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 170-71 (7th Cir. 1996) (Posner, J.) (selection of a specific number is "a legislative function"). But just as important, as the Court of Appeals recognized, is the fact that the question in these cases (including NAAQS standard-setting) is inherently "one of degree." Pet. App. 11a. In ratemaking and similar numeric rulemakings, agencies invariably retain flexibility in fixing the right "stopping point" along the road but, to continue the automotive metaphor, there must always be both a gas pedal and brake in making that determination. *See id.*

This Court's nondelegation decisions in ratemaking and analogous numeric standard-setting contexts thus consistently reflect this need to balance competing considerations. In *FPC v. Hope Natural Gas Company*, for instance, the Court rejected a nondelegation challenge because "the fixing of 'just and reasonable' rates . . . involves a *balancing* of the investor and the consumer interests." 320 U.S. 591, 603 (1944) (emphasis added). Consumers are thus entitled to "reasonable" rates, while regulated entities must be permitted to recover revenue to offset costs, including "revenue not only for operating expenses but also for the capital costs of the business." *Id.*

This same principle also holds in contexts where proxy economic variables are used as a means of balancing the competing interests. In *J.W. Hampton*, for example, the Court sustained as "intelligible" a delegation to the President of authority to set import duties "equal" to the difference between domestic and foreign costs of production. 276 U.S. at 404-05. To the same effect are this Court's decisions rejecting

nondelegation challenges when agencies set prices by determining the cost of production. *See, e.g. Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (upholding delegation to set coal prices yielding a "fair return" based on measures of cost); *ICC v. Goodrich Transit Co.*, 224 U.S. 194, 211 (1912) (upholding authority of ICC to set rates of interstate carriers based on assessment of the cost of service). Still other cases endorse even more complex cost or price measurements. *See, e.g., Lichter v. United States*, 334 U.S. 742, 793-802 (1948) (upholding delegation to recoup excess wartime profits by reference to measurements of costs). Even the very broad delegation in *Yakus* comported with this model since the Price Administrator was required to consider both base-period prices and (again, contrary to *Lead Industries*) costs. *See* 321 U.S. at 421.

The principle underlying these decisions is obvious. If, by analogy to *Lead Industries*, a lower court in *Hope Natural Gas* had ruled that the Federal Power Commission ("FPC") were barred from considering production costs or the interests of suppliers in setting "just and reasonable" rates, then there would have been no rational basis for setting those rates above zero since consumers always benefit incrementally from lower and lower rates. Under that hypothetical, a very different nondelegation challenge would have been presented, but there can be little doubt that this Court would have resolved that challenge—not by striking down the statute—but instead by overturning the lower court decision and interpreting the statute to require a "balancing of the investor and consumer interests" just as this Court actually did in *Hope Natural Gas*. *See* 320 U.S. at 603. The same reasoning applies directly in this case and provides yet another reason for rejecting *Lead Industries*' prohibition on considering competing factors in setting NAAQS.

B. The Administrator Cannot Escape Her Concession That There Was No Intelligible Principle Here by Attempting to Rewrite the Record.

The Administrator begins the critical subpart of her brief by asserting that "Section 109 easily satisfies this Court's 'intelligible principle' standard." EPA Br. 22. That critical subpart then continues for nearly four pages, at the end of which the reader is just as puzzled as was the Court of Appeals after wrestling with similar passages in briefing below: "These sentences begged the key question about that intelligible principle: 'What is it?'" Pet. App. 73a-74a. The fault lies, of course, not so much with the Administrator but with *Lead Industries*, a decision that logically reduces the Act's statutory directives to constitutionally inaudible "one-hand clapping," by precluding consideration of all factors "on the other hand" in the setting of NAAQS. Under such circumstances, it is hardly surprising that the Administrator is reduced to various generalities like the following: "Congress has placed multiple specific restrictions on EPA's discretion in setting and revising NAAQS . . . The Act prescribes the legal standard EPA is to apply, factors that EPA is to consider, a body of experts that EPA is to consult, and procedures that EPA must follow in making its highly technical scientific judgments about the health and welfare effects of particular pollutants." EPA Br. 25 (internal quotation omitted).

What exactly does this passage mean? The reference to a "legal standard" presumably is intended to refer to the text of section 109, but, as noted previously, the Administrator has refused to give any definite meaning to the statutory terms and echoes *Lead Industries* which itself ignores the text and statutory structure in favor of snippets of legislative history. *See* Cross-Pet. Br. 33-42. As for the "factors that EPA is to consider," the Administrator must be referring to the "factors" it cited to the Court of Appeals. *See* Pet. App. 5a-6a. But these factors all point in only one direction and only restate the

"intuitive proposition that more pollution will not benefit public health, not that keeping pollution at or below any particular level is 'requisite' or not requisite to 'protect the public health' with an 'adequate margin of safety,' the formula set out by § 109(b)." Pet. App. 7a.

The Administrator's intelligible principle thus reduces to an unhelpful reliance on "experts" and "procedures." But such provisions, while often useful in helping to check discretion, can serve their function only to the extent that Congress has laid down an "intelligible principle" to which the agency "is directed to conform." *J.W. Hampton,* 276 U.S. at 409. The very purpose of that required intelligible principle, of course, is to provide the essential substantive touchstone for public comments, expert advice and eventual judicial review. Indeed, the Administrator herself concedes that point when she states that the purpose of the nondelegation doctrine is to enable the judiciary to "'ascertain whether the will of Congress has been obeyed.'" EPA Br. 22 (quoting cases).

The Administrator builds a straw man when she says that the Court of Appeals demands, as the intelligible principle, "that EPA demonstrate that the numerical standard the agency selected was the sole possible choice." EPA Br. 30. Again referencing *Lockout/Tagout I*, the court below could not have been clearer that the intelligible principle required need only be "a systematic weighing" of relevant considerations—a principle entirely in keeping with the "zone of reasonableness" that confines an agency's exercise of discretion. *See* Pet. App. 14a-15a; EPA Br. 30 (relying on FPC ratemaking cases). It is precisely such a weighing of competing interests, for example, that allowed the FPC to set rates based upon a "balancing of the investor and consumer interests" under *Hope Natural Gas* and the other Federal Power Commission cases cited by the Administrator. 320 U.S. at 603. More generally, under this Court's decisions, an intelligible principle need not be a *rule* that defines precise outcomes in all circumstances; indeed, in

most circumstances it need only be a *standard* against which an agency's exercise of discretion may be tested within the rulemaking and on judicial review. *Cf.* Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 42-61 (1990) (discussing the rules/standards distinction in a variety of contexts).

The requirement of a substantive standard that serves as a constraint on agency discretion is so fundamental to our jurisprudence that the origins of this requirement are often overlooked. *See, e.g., Iowa Utils. Bd.*, 525 U.S. at 388. Such a requirement is nonetheless implicit both in the Constitution and in the Administrative Procedure Act. *See e.g., American Lung Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998) ("[T]he Administrator may well be within her authority . . . . But [she must] describe[] *the standard* under which she has arrived at this conclusion, supported by a 'plausible' explanation. . . .") (emphasis added; brackets omitted); *Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (agency must "giv[e] some definitional content" to the statutory standard because "[t]o refuse to define the criteria it is applying is equivalent to simply saying no without explanation"). Indeed, without a substantive and "binding" standard to apply, as the lower court observed, there can be no "meaningful judicial review." Pet. App. 14a.

Having previously conceded that her decisions were "largely judgmental in nature" and did not follow any "generalized paradigm," 62 Fed. Reg. at 38,688, 38,883, the Administrator now claims that "[i]n each case, EPA also identified a *lower* bound for consideration at the most protective levels the scientific evidence reasonably supported." EPA Br. 31(emphasis in original). This claim hardly supplies the missing intelligible principle but it bears remembering that the Administrator may be upheld only "on the same basis articulated in the [ruling] by the agency itself," *not* on the basis of "appellate counsel's *post hoc* rationalizations." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69

(1962); *accord SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The record below confirms that EPA here offered only "minimally informative generalities" that do "not explain[], in concrete terms, why [she] chose one level of regulation rather than another." Sunstein, 98 Mich. L. Rev. at 327, 330; *see also* Pet. App. 71a-72a (referring to the same arguments made by the Administrator here as *post hoc* arguments of counsel).

Beginning with ozone, the Administrator concedes the absence of an "effects threshold" but argues that she determined that "the lower bound—0.07 ppm—was the level at which EPA's exposure assessment showed that exposures of public health concern were 'essentially zero.'" EPA Br. 31-32. The Administrator's concession of a "no effects threshold" for ozone echoes her previous statement that "it is not possible to select a level below which absolutely no effects are likely to occur." 62 Fed. Reg. at 38,863; *see* Cross-Pet. Br. 6-7 (noting similar statements in the EPA Staff Paper and by CASAC). But the more important point is the one made by the Court of Appeals—even if there *were* a *possible threshold*, that would not avoid the "indeterminancy" of the Administrator's standard-setting process unless she affirmatively determined what that threshold was and found that no health risks exist below that level. *See* Pet. App. 5a-6a. Otherwise, there always will be "'possible, but not certain'" health effects at every level, thereby producing the "same indeterminancy" that gave rise to the lower court's nondelegation holding. *Id.* at 10a-11a (quoting 62 Fed. Reg. at 38,678).

The Administrator's further claim that there are "essentially zero" ozone "exposures of public health concern" below 0.07 ppm is both circular and belied by the record. By "exposures of concern" the Administrator is referring to her own definition in the Federal Register that "exposures of concern" mean "exposures at and above 0.08 ppm, 8-hour average," 62 Fed. Reg. at 38,860, thus making her statement entirely tautological given that 0.07 ppm is less than 0.08 ppm.

Supporting her claim that 0.08 ppm has special health significance, the Administrator now claims to have "identified important and meaningful differences in the character of the scientific evidence regarding risks—including the estimated frequency and duration of adverse health effects—associated with levels above and below 0.08 ppm." EPA Br. 33. But those supposed differences do not refute the presence of health effects below the level selected by the Administrator. Nor has the Administrator ever interpreted the statute as allowing her to regulate only certain types of health risks and, as the court below noted, the Administrator "never suggested that [she] could not (or in a later rulemaking would not) base a NAAQS upon evidence . . . that revealed adverse but transient effects." Pet. App. 73a.

In the case of PM, the Administrator now argues that her newly-discovered "lower bound" consists of "the lowest level at which long-term epidemiological data indicated there *might be* an 'effects threshold' below which there is no risk of health effects." EPA Br. 31(emphasis added). As noted by the Court of Appeals, the Administrator never made an affirmative determination concerning whether PM was, or was not, a non-threshold pollutant. Pet App. 6a. But that fact only confirms the "indeterminancy" in the Administrator's standard-setting which (together with *Lead Industries*) elicited the non-delegation holding below. *See id.* For unless the Administrator affirmatively determines a health effects threshold and sets the standard with that threshold as the starting point, there always will be "'possible, but not certain'" health effects at every level. *Id.* at 11a-12a (quoting 62 Fed. Reg. at 38,678). It is for this very reason that the PM Staff Paper found that PM presents a "continuum of exposures" such that "attempting to identify '[the] lowest observed effects level' and adding margins of safety below such levels is not an appropriate approach in this case." PMJA 2134-35. The Administrator accepted that EPA Staff advice when setting the final PM standards. *See* 62 Fed. Reg. at 38,673.

Significantly, the very passage from the PM Staff Report cited by the Administrator in support her "lower bound" point, *see* EPA Br. 31 (citing PMJA 2145, 2147), goes on to explain that the level now relied upon by the Administrator as her "lower bound" reflects "inherent limitations of the data for discerning effects thresholds," and it is "not likely to be risk-free." PMJA 2145-46, 2148. The Administrator herself repeated this advice in the final PM rules, when she acknowledged that her standards could not be "risk-free," given "the inherent uncertainties." 62 Fed. Reg. at 38,665, 38,674. She made the same point before the Court of Appeals, conceding that the PM standards, like the ozone standards, "could not be risk-free" and "cannot eliminate all risk to public health." Resp. Br. in D.C. Cir. No. 97-1440, at 34, 119.

The conceded existence of PM health risks below the levels selected by the Administrator is entirely consistent with the reference to the "long-term epidemiological data" mentioned in her "lower bound" statement. *See* EPA Br. 31. To begin, it bears noting that the Administrator only defends the annual $PM_{2.5}$ NAAQS and barely even acknowledges the existence of the 24-hour $PM_{2.5}$ and PM_{10} standards. *See id.* at 10-11 & n.11, 31-33. With respect to the annual $PM_{2.5}$ NAAQS, she claims to have relied on "a scientific criterion applicable to epidemiological studies—statistical significance to the 95% confidence level." *Id.* at 32. But the Administrator never so limited herself below; quite the contrary, she claimed that "[t]here is *no requirement* that EPA have some theoretical ideal amount of scientific information *or degree of certainty* before establishing or revising a NAAQS." Resp. Br. in D.C. Cir. No. 97-1440, at 49 (emphasis added). Nor did the Administrator so limit herself in selecting the 24-hour $PM_{2.5}$ or other PM NAAQS, or more generally, in other Clean Air Act rulemakings. *See e.g.*, *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 n.58 (D.C. Cir. 1976) (*en banc*) ("95% certainties" have "never characterized . . . the administrative process").

Moreover, the Administrator's new focus on the statistical significance of reported studies at the 95% confidence level is, in any event, a scientific *non sequitur* as it relates to the separate scientific question of determining a threshold effects level. Statistical significance is simply a means of testing the null hypothesis, specifically, the likelihood that an association between an identified level of exposure and a specified health effect is explainable by chance. Kenneth F. Rothman, *et al.*, MODERN EPIDEMIOLOGY 184 (1998). It says nothing about the separate question of whether effects—even highly dangerous effects—may occur at levels well below the levels found statistically significant in the study. Indeed, the Administrator herself made essentially that point below: "[e]ven at levels *below* the hypothetical thresholds" considered in the studies, "risk estimates indicated increased mortality and morbidity that were *significant* from a public health perspective." Resp. Br. in D.C. Cir. No. 97-1440, at 77 (emphases added). In short, the Administrator did not (and could not) determine a health effects threshold on the record here—a fact which only confirms the fatal indeterminacy in the Administrator's decisionmaking that, together with *Lead Industries*, led to the Court of Appeals' nondelegation holding.

C. Repudiating *Lead Industries* and Requiring Consideration of Competing Factors in Setting NAAQS Will Supply the Missing Intelligible Principle and Resolve the Nondelegation Problem.

As detailed in our brief as cross-petitioners, the Clean Air Act, properly construed, requires that the Administrator consider competing factors including costs (and the costs to health) in setting NAAQS. The text, fairly and naturally understood, compels that conclusion, *see* Cross-Pet. Br. 33-37, and it is confirmed by the statutory structure and purposes, *see id.* at 37-43. Moreover, any ambiguity that might, in other circumstances, be perceived in the text disappears, given that "Congress could not have intended to delegate" to the

Administrator "a decision of such economic and political significance" as whether to exclude all non-health factors in setting NAAQS. *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1315 (2000); *MCI v. AT&T*, 512 U.S. 218, 231 (1994); *Christensen v. Harris County*, 120 S. Ct. 1655, 1664 n.1 (2000) (Scalia J., concurring); *id.* at 1667 (Breyer, J., dissenting). The textual imperative under these circumstances is further reinforced both by the need for transparency in the agency decisionmaking process, *see* Cross-Pet. Br. 43-47, and by the necessities of effective executive, congressional and judicial oversight of EPA's NAAQS standard-setting, *see id.* at 47-50.

Starting from the ostensibly different perspective of the nondelegation doctrine, the D.C. Circuit reached an analogous conclusion in *Lockout/Tagout I*. Specifically, that court concluded that the missing "intelligible principle" in cases such as this is a "cost-benefit analysis," by which the court meant "only a systematic weighing" of competing considerations, including costs. 938 F.2d at 1321. The court went on to define that "systematic weighing" at its most basic conceptual level by citing what "Benjamin Franklin referred to as a 'moral or prudential algebra'":

> When those difficult cases occur, they are difficult, chiefly because while we have them under consideration, all the reasons pro and con are not present to the mind at the same time. . . . To get over this, my way is to divide half a sheet of paper by a line into two columns; writing over the one Pro, and over the other Con. . . . And, though the weight of reasons cannot be taken with the precision of algebraic quantities, yet when each is thus considered, separately and comparatively, and the whole lies before me, I think I can better judge, and am less liable to make a rash step. . . .

Id. (citation omitted). In line with this conception, our cross-petition demonstrates that the Act requires the Administrator to consider competing factors in NAAQS rulemakings, as is the usual practice in proceedings setting important health and safety standards. *See, e.g., Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54 (1983) (safety agency "correct to look at the costs as well as the benefits" of auto safety regulations).

The Administrator nonetheless raises an alarm that such a weighing of competing considerations would at once rob her of all discretion in setting NAAQS and spell the death-knell of environmental regulation under the Clean Air Act. But one need look no further than President Clinton's Executive Order 12,866 to see that this is not the case. *See* 58 Fed. Reg. 51,735 (Sept. 30, 1993). Apart from the requirement that agencies "should assess all costs and benefits of available regulatory alternatives," *see id.* § 1(a), the Executive Order (like Ben Franklin's "systematic weighing of pros and cons") would leave the agency with considerable discretion over nearly every aspect of NAAQS standard-setting. For example, the agency would retain discretion within APA constraints to assess both "the degree and nature of the risks," to decide which costs and benefits are capable of being quantified and which are not, and to decide how to factor in matters such as "distributional impacts" and "equity." *Id.* § 1(a, d). Nor would such "a systematic weighing" prevent EPA from regulating ozone, PM or other substances under the Act (although it might call into question regulations which, without explanation, impose costs that exceed the benefits, *see* Cross-Pet. Br. 10-12, 18-19, 30, 46).

This Court has sometimes deployed the nondelegation doctrine as a means of "giving *narrow constructions* to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta*, 488 U.S. at 373 n.7 (citing *Benzene* and *NCTA*) (emphasis added); *accord Amalgamated*

Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (Leventhal J.). But whatever the merits of aggressive judicial construction in other cases, there is no need for such carpentry here. As our brief as cross-petitioners demonstrates, the plain meaning of the Act, together with a great variety of supporting considerations—including the nondelegation doctrine as detailed in this brief—all compel the conclusion that the Administrator must weigh all competing *public health* factors, including costs (and costs to health), in setting NAAQS.

The Administrator pins much of her argument on the claim that "the Court of Appeals improperly employed the nondelegation doctrine to expand the scope of its review." EPA Br. 26-31. That claim also is misplaced. Perhaps, given *Lead Industries* and the conceded "indeterminancy" of the Administrator's NAAQS decisionmaking, the lower court might simply have declared section 109(b)(1) unconstitutional under this Court's nondelegation decisions. But the Court of Appeals' remand remedy was both well-grounded in circuit precedent, *see* ATA Cross-Pet. for *Cert.* 10-12 (citing cases), and readily defensible under *Chevron II*. *See* Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399 (2000).

In any event, the lower court can hardly be faulted for giving the Administrator a final chance to fashion an interpretation that might pass constitutional muster. The Administrator certainly retains significant discretionary authority over NAAQS standard-setting—except, of course where her assertions of authority collide with Congress' unambiguous intent or requirements of the nondelegation doctrine. Under such circumstances, and given *Chevron*, it was hardly error for the Court of Appeals to remand before finally deciding whether or not the *Lead Industries* doctrine itself rendered the Act unconstitutional. Indeed, if this Court

ultimately decides to repudiate *Lead Industries*, it should follow the Court of Appeals' lead and order a remand to the agency for promulgation of new standards, albeit after vacating both the ozone and PM standards challenged in this case.

II. THE COURT OF APPEALS' IMPLEMENTATION HOLDING IS CORRECT, BUT NEED NOT BE REACHED BY THIS COURT.

Like the issues presented in our cross-petition, and the nondelegation issue discussed above, the Administrator's Subpart 2 claims may be readily resolved through proper statutory construction. Specifically, the Court of Appeals' holding that the Administrator may not implement a revised ozone standard lower that the standard in effect on the date of the 1990 Clean Air Act Amendments is compelled by the plain language, structure and drafting history of the Act—all of which carry out Congress' specific intent to deprive the Administrator of the very discretion she now seeks to recover. *See* Part II.A, *infra*. Moreover, contrary to the Administrator's claim, that issue was ripe for decision by the Court of Appeals. Nonetheless, this Court may properly elect not to address Subpart 2 for quite different reasons; namely, that the Administrator's Subpart 2 arguments go only to the rationale of the decision below, not its ultimate result. *See* Part II.B, *infra*.

A. The Court of Appeals Correctly Held that Subpart 2 Applies to Implementation of All Ozone NAAQS, Including Revised Ozone NAAQS, Thus Effectively Precluding Implementation of the Ozone NAAQS Under Review Here.

On the merits, the question presented is whether the 1990 Congress' painstakingly crafted solution to the long-standing ozone nonattainment problem was intended to be binding—or, as the Administrator argues, "stillborn" from the moment of enactment. Pet App. 42a. In particular, the Administrator

seeks repeal of the "specific[]" directives of Subpart 2 of Part D of the Act's Title I, so that she can pursue a different policy under her "*general* authority under other provisions of the CAA." EPA Br. (I) (emphasis added). But that claim is implausible on its face, for it is a "commonplace of statutory construction" that "the specific governs the general," not the other way around. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Indeed, this canon has particular applicability here, because Congress enacted Subpart 2 precisely in order to strip the Administrator of discretion she previously had, and is now attempting to reassert, under the Act's Subpart 1. It is therefore not surprising that the Administrator's interpretation is precluded by plain statutory text, *see* Part II.A.1, *infra*, as well as by the Act's structure, drafting history and purposes, *see* Part III.A.2, *infra*, and is by no means required to avoid "absurd results," *see* Part III.A.3, *infra*.

1. The Text of Subpart 2 Unambiguously Encompasses Implementation of All Ozone NAAQS.

The statutory text alone is dispositive because in this instance "Congress has spoken on the 'precise question at issue.'" Pet. App. 38a (quoting *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 & n.9 (1984)). Specifically, the Act requires that the Nation be divided into air quality areas, and that each area be designated "attainment," "nonattainment" or "unclassifiable" with respect to each NAAQS. *See* CAA § 107(b-d), 42 U.S.C. § 7407(b-d). Areas designated "nonattainment" are then assigned "classifications" and mandated "attainment dates" (deadlines for achieving "attainment" status) under one of several subparts of the Act. As the Administrator notes, Subpart 1 *generally* governs the assignment of classifications and attainment dates "with respect to any national ambient air quality standard," including "any revised standard." CAA § 172(a)(1)(A), 42 U.S.C.

§ 7502(a)(1)(A); EPA Br. 45. Under this subpart, the Administrator assigns classifications based on discretionary factors such as "severity of nonattainment" and "feasibility" of "pollution control measures," and then, based in part on these classifications, assigns each area an attainment date. CAA § 172(a)(1)(A), (2)(A), 42 U.S.C. § 7502(a)(1)(A), (2)(A).

Of central importance here, however, Subpart 1 expressly states that this discretionary regime "*shall not apply* with respect to nonattainment areas for which classifications are *specifically provided under other provisions of this part.*" CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C) (emphasis added); *see also* CAA § 172(a)(2)(D), 42 U.S.C. § 7502(a)(2)(D) (same for attainment dates). Moreover, this express exception squarely applies to the ozone NAAQS. That is because Congress "specifically provide[d]" classifications and attainment dates for implementation of the ozone standard in the Act's Subpart 2. *See* Pet. App. 43a. In particular, Subpart 2 provides that "[*e*]*ach* area designated nonattainment for ozone pursuant to section 7407(d) [CAA § 107(d)] *shall* be classified at the time of such designation, *under table 1*, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area." CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Table 1 then sets out classifications and attainment dates based on a region's design value (a measure of its ozone level). *See id.* Attainment dates vary by classification, and extend until 2010 for those areas that have the most severe nonattainment problems. *See id.* Table 1 is reprinted below:

Area Class	Design Value	Primary Standard Attainment Date
Marginal	0.121 up to 0.138	3 years after [enactment]
Moderate	0.138 up to 0.160	6 years after [enactment]
Serious	0.160 up to 0.180	9 years after [enactment]
Severe	0.180 up to 0.280	15 years after [enactment]
Extreme	0.280 and above	20 years after [enactment]

As noted above, section 181(a)(1), including Table 1, applies by its terms to "[e]ach area designated nonattainment for ozone pursuant to section 7407(d) [CAA § 107(d)]." Since section 107(d) expressly governs designations pursuant to "new *or revised* standards," the plain language of sections 172, 181, and 107 together unambiguously provide that Table 1 governs the assignment of classifications and attainment dates for *all* ozone NAAQS, including the revised ozone NAAQS established by the Administrator in this case. *See* CAA § 107(d)(1)(A), 42 U.S.C. § 7407(d)(1)(A) (emphasis added); *see also* CAA § 107(d)(1)(B)(i), 42 U.S.C. § 7407(d)(1)(B)(i) ("Upon promulgation *or revision* of a [NAAQS], the Administrator shall promulgate the designations of all areas") (emphasis added).

Table 1 conspicuously establishes classifications *only* for areas with ozone levels above 0.12 parts per million ("ppm")—the level of the 1979 ozone NAAQS. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1). It thus makes no provision for ozone standards set below the 0.12 ppm level. By requiring that all ozone nonattainment areas be assigned classifications and attainment dates only pursuant to Table 1, and then establishing a 0.12 ppm lower-bound for the assignment of those classifications and attainment dates,

sections 172, 181, and 107 preclude the Administrator from making nonattainment designations or assigning classifications or attainment deadlines for any ozone NAAQS lower than the one established in 1979. In sum, the Act unambiguously precludes implementation in any fashion of a more stringent ozone NAAQS.

The Administrator has never found a valid response to this straightforward textual analysis. In the Court of Appeals, she initially argued that Congress erred in cross-referencing section 107(d) in its entirety, and instead must have intended to reference only subsection 107(d)(4), which provided for initial designations immediately after the 1990 Amendments. *See* Pet. App. 42a. On rehearing, she switched to arguing in favor of a different scrivener's error, claiming that Congress actually meant to cross-reference "section 107(d)(1)(C) and section 107(d)(4)." Pet. App. 79a. Now before this Court she appears to have reverted to her original interpretation, albeit without expressly renouncing the position she argued on rehearing.

As the Court of Appeals explained, however, there is no basis for deeming these critical statutory provisions the "drafting error" that the Administrator's interpretation "implies." Pet. App. 39a. To the contrary, Congress chose to reference section 107(d) *as a whole*, not only in Subpart 2, but also in Subparts 3, 4, and 5 of the Act, which provide guidelines for implementation of the other five NAAQS then on the books (carbon monoxide, PM, sulfur oxides, nitrogen dioxide, and lead). *See* CAA §§ 186(a)(1), 188(a)(1), 191(a)(1), 42 U.S.C. §§ 7512(a)(1), 7513(a)(1), 7514(a)(1). The Court of Appeals explained that all "Subparts of the Clean Air Act providing requirements for nonattainment areas begin with a reference to § 107(d)" in its entirety. Pet. App. 79a. The Administrator's "interpretation" thus implausibly posits not an isolated scriveners's error, but a total scrivening breakdown.

The Administrator further attempts to evade the Act by arguing that, however clear *Subpart 2* and analogous provisions

might be, *Subpart 1* conflicts with itself, thus creating ambiguity. *See* EPA Br. 45-46. She seeks to manufacture this ambiguity by observing first that the classification provisions of Subpart 1 state that they govern the classification of areas pursuant to any NAAQS, including "'any revised standard.'" She then notes that these same provisions state that they "'shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part'"—namely, areas for which classifications are "specifically provide[d]" under Subparts 2, 3, and 4. Finally, the Administrator deems these statements "seemingly competing references" and proceeds to read Subpart 2 out of the Act. *See id.* (quoting CAA § 172(a)(1)(A, C), 42 U.S.C. § 7502(a)(1)(A, C)).

But, there is nothing at all unusual about this statutory structure—provisions that first speak in broad terms and then carve out exceptions. In this case, Subpart 1's default classification provisions continue to govern any revised sulfur oxide, nitrogen dioxide, or lead NAAQS (covered in Subpart 5), plus any new NAAQS for other substances, because Congress has not "specifically provide[d]" classifications for these NAAQS elsewhere in part D. CAA § 172(a)(1)(C), 42 U.S.C. § 7502(a)(1)(C). In contrast, however, Congress *did* "specifically provide" classifications for ozone, as well as for PM and carbon monoxide. Subpart 1 thus fully accords with both itself and with Subparts 2, 3, and 4 (governing ozone, carbon monoxide, and PM, respectively) by stating in section 172(a)(1)(C) that it "'shall not apply with respect to" these three types of "nonattainment areas," for which Congress has elsewhere "specifically provided" classifications. *Id.*

Lacking arguments based on statutory text, the Administrator is left to rely only on the *title* of a single subsection (subsection 181(a)), which she says "clarifies that Section's reach and resolves any confusion." EPA Br. 46. But this Court has held that a title "is of use only when it sheds

light on some ambiguous word or phrase," *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (brackets omitted); it "cannot be allowed to create an ambiguity in the first place." Pet. App. 43a (citations and quotations omitted). As demonstrated above, there is no textual confusion in this case; hence no occasion for "clarification." Moreover, even if there were ambiguity, it would be resolved first and foremost, not by resort to titles, but by application of the "commonplace of statutory construction" that "the specific," highly detailed provisions of Subpart 2 should "govern" the much more "general" provisions of Subpart 1. *Morales*, 504 U.S. at 384.

In fact, however, subsection 181(a)'s title not only is irrelevant, it also does not support the Administrator. That title reads, "Classification and attainment dates for 1989 nonattainment areas." According to the Administrator, these "1989 nonattainment areas are, of course, the areas that were subject to the one-hour ozone standard then in force." EPA Br. 46. But that interpretation cannot be correct. Initial designations and classifications under the 1990 Amendments were to occur, not in 1989, but in late 1990 or 1991. *See* CAA § 107(d)(4)(A)(i), 42 U.S.C. § 7407(d)(4)(A)(i). The Administrator never explains why Congress would have consciously decided *not* to apply its elaborate Subpart 2 implementation regime to nonattainment areas that had lapsed into nonattainment in 1990, or, conversely, why it *would* apply its scheme to areas that had achieved attainment after 1989 but before enactment of the Amendments. *See, e.g.*, 55 Fed. Reg. 35,625 (Aug. 31, 1990). In fact, EPA's actual initial designations under the 1990 Amendments occurred in 1991 and were based on areas' attainment status as of the date of enactment of the Act, November 15, 1990—these designations had nothing to do with areas' 1989 status. *See* 56 Fed. Reg. 56,694 (Nov. 6, 1991). In addition, the Administrator also fails to explain her logical leap from a reference to 1989 *areas* to her conclusion that Subpart 2 governs implementation of the 1989 *standards*. And finally, she simply overlooks the absence of an

analogous date in the title of section 186(a), which provides classifications, attainment dates, and control methods for the carbon monoxide NAAQS. *See* CAA § 186(a), 42 U.S.C. § 7512(a) (entitled "Classification by operation of law and attainment dates for nonattainment areas").

Any possible confusion created by the subsection 181(a) title is easily resolved by the 1990 drafting history. Specifically, the title to subsection 186(a) which governs carbon monoxide was changed in the drafting process from an earlier version that was precisely parallel to the enacted version of the subsection 181(a) title. *See* H.R. 3030, 101st Cong. § 104 (1989), *reprinted in* II Senate Comm. on Env. and Public Works, 103d Cong., *Legislative History of the Clean Air Act Amendments of 1990*, at 3832 (1993) ("*1990 Legislative History*"). Subsection 181(a)'s title apparently should have simultaneously received conforming changes, but, for whatever reason, those changes were never made. This minor oversight is of much less importance, however, than the fact that the Administrator is compelled to rest her entire "textual" case—not on the statutory text itself—but instead on a loosely drafted, easily explained, subsection *title* that is not properly part of the statute.

2. The Statutory Structure and Legislative History Confirm that Subpart 2 Governs Implementation of All Ozone NAAQS.

The structure, drafting history and statutory evolution of Subpart 2 confirm that its provisions mean what they say and were affirmatively intended to withdraw the very implementation authority the Administrator now seeks to recover. *Cf. Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35, 42-43 (1990) (no deference due when in light of "the provisions of the whole law, and . . . its object and policy," the statute "clearly expresses Congress' intention") (internal quotation omitted). As explained below, Congress enacted Subpart 2 to "strip[] the EPA of discretion" because the Agency

had failed to bring the Nation into compliance with the ozone NAAQS, and in particular, had permitted States to miss deadlines, had extended those deadlines, and then had watched the States miss them again. *See* Pet. App. 39a-40a; H.R. Rep. No. 101-490, pt. 1, at 145-48 (1990), *reprinted in II 1990 Legislative History*, at 3169-72; S. Rep. No. 101-228, at 10-12 (1989), *reprinted in V 1990 Legislative History*, at 8350-52 ("1989 Senate Report").

With Subpart 2, Congress sought to remedy these problems with EPA's implementation discretion by setting what it viewed as "realistic," long-term schedules and controls that take effect "by operation of law" and replace the former, much more discretionary implementation regime. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1); 1989 Senate Report at 12, *reprinted in V 1990 Legislative History*, at 8352. Congress' cure for the pre-1990 Act's perceived flaw—its failure to furnish sufficiently concrete guidance for selecting and enforcing ozone control measures—is therefore evident not just in sections 107, 172, and 181(a), but throughout the structure, drafting history and statutory evolution of Subpart 2.

For instance, carefully crafted Subpart 2 provisions reinforce the statutory lower-bound on ozone NAAQS implementation by withdrawing the Administrator's discretion to adjust the ozone NAAQS compliance calculation. The Administrator is thus directed to calculate design values for classification purposes "according to the interpretation methodology issued by the Administrator most recently *before* November 15, 1990," and to "submit[] *to Congress*"— but not herself to act upon—a report considering whether this frozen methodology is reasonable. *See* CAA §§ 181(a)(1), 183(g), 42 U.S.C. § 7511(a)(1), 7511b(g) (emphasis added). Tellingly, in the one instance in which Congress did permit changes to this methodology, Congress also provided specific safeguards to ensure that the Administrator would not thereby effect a substantive change in the standard. *See* CAA § 181(b)(4)(D),

42 U.S.C. § 7511(b)(4)(D) (addressing certain severe areas). And similarly, while Subpart 2 does provide certain exceptions to the Table 1 compliance schedule, it frames those exceptions in objectively determinate terms and conspicuously fails to create such an exception for ozone NAAQS revisions. *See* CAA §§ 181(a)(4,5), (b)(1), 42 U.S.C. §§ 7511(a)(4,5), (b)(1).

Viewed in broader terms, it is even more evident that Subpart 2 cannot be subject to repeal at the Administrator's whim or command. Subpart 2 sets out page upon page of detailed provisions requiring ozone nonattainment areas to adopt specific control programs. *See, e.g.*, CAA § 182, 42 U.S.C. § 7511a. These controls are integrally related to section 181(a)'s Table 1 and the remainder of the Subpart 2 scheme, as they vary in stringency according to an area's nonattainment classification under that pivotal table. *See* CAA § 182(a-e), 42 U.S.C. § 7511a(a-e). Subpart 2 thus specifies detailed sanctions against States that fail to comply with Table 1's deadlines. *See* CAA § 185, 42 U.S.C. § 7511d. And many Subpart 2 controls provide expressly that they are to be phased in over a period of many years, underscoring that Congress intended Subpart 2 to last. *See, e.g.*, CAA § 182(c)(5), 42 U.S.C. § 7511a(c)(5) (mandating transportation assessments beginning in 1996 "and each third year thereafter" for serious, severe, and extreme areas); CAA § 182(e)(3), 42 U.S.C. § 7511a(e)(3) (imposing clean fuels and advanced technology requirements for severe areas beginning in 1998). Moreover, Subpart 2 makes automatic provision for additional control measures in areas that miss attainment dates. These provisions, also integrally related to the Table 1 classifications, require even greater emissions reductions indefinitely into the future, even after initial attainment deadlines have been missed. *See* CAA § 181(b)(2, 4), 42 U.S.C. § 7511(b)(2, 4). Accordingly, Subpart 2 can only be seen for what it is—the carefully drawn and lasting blueprint for revoking the Administrator's discretionary implementation authority.

Given the importance of these restrictions on the Administrator's authority, it is not surprising that the 1990 Congress considered—and rejected—several proposals that would have granted her additional authority of the sort she now seeks. For instance, Congress rejected bills that would have limited Subpart 2 to the 1979 ozone NAAQS then in force. The bill passed by the Senate but later modified in conference, as well as a bill introduced but rejected by the House, would have applied Subpart 2 solely to designations made pursuant to what later became section 107(d)(4)—the one-time provision governing designation immediately after the 1990 Amendments. *See* S. 1630, 101st Cong. §§ 101, 107 (1990) ("1990 Senate Bill"), *reprinted in III 1990 Legislative History*, at 4124-25, 4195; H.R. 3030, 101st Cong. §§ 101(a), 103 (1989), *reprinted in II 1990 Legislative History*, 3748-49, 3795-96. Similarly, Congress also considered and rejected a classification plan that would have accommodated a revised and tightened ozone standard. The Senate bill thus included a table, reprinted below, which would have set classifications and attainment dates based on the *percentage* by which an area exceeded such a flexible NAAQS:

Area Classification	**Amount by which standard exceeded**
Moderate ozone nonattainment area	Not greater than 20 per centum
Serious ozone nonattainment area	More than 20 per centum but less than 50 per centum
Severe ozone nonattainment area	Equal to or greater than 50 per centum but not more than 120 per centum
Extreme ozone nonattainment area	More than 120 per centum

S. 1630, 101st Cong. § 107 (1990), *reprinted in III 1990 Legislative History*, at 4195. Because "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation omitted), Congress' rejection of these legislative alternatives underscores that Subpart 2 means exactly what it says.

Finally, this definitive evidence from text, structure and drafting history is further confirmed by the context within which Congress enacted the 1990 Amendments. The fatal flaws that emerged from both the 1970 and 1977 Amendments to the Act were their failure to set out specific controls and realistic attainment deadlines for ozone. EPA promulgated its first ozone NAAQS in early 1971, together with other NAAQS for particulate matter, sulfur dioxide, nitrous oxides, carbon monoxide and hydrocarbons. *See* 36 Fed. Reg. 8,186 (Apr. 30, 1971). The Act at that time contemplated enforcement of all of these standards through one-size-fits-all implementation that essentially called for attainment of all primary NAAQS, by all areas of the Nation, by 1975. *See* CAA § 110(a)(2)(A), 42 U.S.C. § 7410(a)(2)(A) (1976). This statutory structure broke down, however, when large areas of the Nation simply failed to comply—especially with the 1971 ozone NAAQS—by that date. Widespread nonattainment led, unsurprisingly, to litigation designed to enforce the Act's literal requirements. These cases included a ruling that the Clean Air Act required massive social and economic dislocation in California in order to achieve ozone compliance, *see City of Santa Rosa v. EPA*, 534 F.2d 150, 153 (9th Cir.), *vacated sub nom. Pacific Legal Found. v. EPA*, 429 U.S. 990 (1976), plus other cases posing the question whether the Act had delegated EPA authority to force States to implement EPA-mandated controls to address ozone nonattainment, *see EPA v. Brown*, 431 U.S. 99, 100-02 (1977) (discussing cases). This first Clean

Air Act crisis passed only when the Solicitor General declined to defend EPA's interpretation of the Act, *see id.* at 103-04, and Congress enacted 1977 Amendments which extended the compliance deadlines for ozone and other pollutants, *see* Pub. L. 95-95, 91 Stat. 691 (Aug. 7, 1977).

The 1977 Amendments ultimately failed, however, for the same reasons that the 1970 Amendments failed. To be sure, they introduced a limited degree of differentiation into the schedules for complying with NAAQS. For ozone and carbon monoxide, the pollutants that had largely prompted the Amendments, this regime established a presumptive five-year deadline, with liberal opportunities for further five-year extensions in areas with the most severe nonattainment problems. *See* CAA § 172(a)(1, 2), 42 U.S.C. § 7502(a)(1, 2) (1982). But Congress still did not extensively dictate controls that States (or, failing that, EPA) would have to implement to achieve attainment. Accordingly, notwithstanding the time extensions (and promulgation of a less-stringent ozone NAAQS in 1979), the 1987 ozone attainment deadlines came and went, just as the 1975 deadlines had, with large areas of the Nation remaining in nonattainment. *See* National Research Council, RETHINKING THE OZONE PROBLEM IN URBAN & REGIONAL AIR POLLUTION 4 (1991). High stakes litigation once again ensued. *See, e.g., Coalition for Clean Air v. Southern Cal. Edison Co.*, 971 F.2d 219, 221-23 (9th Cir. 1992) (describing the history of litigation in California).

After false starts in the 1987, 1988 and 1989 legislative sessions, Congress again passed comprehensive Clean Air Act Amendments in November 1990 addressing, yet again, the recurring ozone nonattainment problem. This time, Congress consciously departed from the one-size-fits-all strategy that twice before had failed. Congress instead set what it viewed as "realistic," long-term schedules and controls that take effect "by operation of law," rather than pursuant to the Administrator's discretion. *See* CAA § 181(a)(1), 42 U.S.C.

§ 7511(a)(1); 1989 Senate Report at 12, *reprinted in V 1990 Legislative History*, at 8352. Although Congress did nominally retain the 1977 regime of a five-year/ten-year attainment schedule with largely discretionary controls, it ghettoized those provisions, now denominated as Subpart 1, by severely restricting their scope of application. *See* pp. 26-27, 30, *supra*. At the same time, Congress also enacted detailed compliance plans targeted at specific pollutants (above all, ozone) as the centerpiece of the 1990 Amendments. These plans are codified in Part D's Subparts 2, 3, 4 and 5. CAA §§ 181-185B, 42 U.S.C. §§ 7511-7511f.

If ever "a page of history" could answer "a volume of logic," *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.), then surely this history fully answers the Administrator's ever-changing rationalizations for why she should be given back her revoked ozone implementation authority. The Administrator's Subpart 1-based interpretation is nothing less than a bid to turn back the clock and resume implementation of the ozone NAAQS as before 1990, amid the uncertainty, unrealistic deadlines and endless litigation that Congress thought it had eliminated. Read carefully in light of its evolution, it is plain that the Act simply does not permit the Administrator to use Subpart 1 as a sword for bringing about the demise of Subpart 2.

3. Congress' Carefully Crafted Statutory Regime Does Not "Lead to Unworkable and Absurd Results."

Instead of admitting that her interpretation is contrary to the mass of evidence cited above, the Administrator claims that this obvious interpretation would "lead to unworkable and absurd results." EPA Br. 47. In particular, she notes that it "would be impossible" to "classify areas and set their attainment dates for the revised NAAQS's eight-hour standard" under Subpart 2 since Table 1 uses "an air quality measurement based upon one-hour averaging." *Id.* She also states, in this

same vein, that because Table 1 "calculates attainment dates for areas based upon a fixed number of years from 1990," it "makes no sense in calculating attainment dates for a revised NAAQS" promulgated at a later date. *Id.* But these arguments all beg the question, for they depend upon the implicit and unsupportable premise that, notwithstanding its plain text, structure, drafting purposes and evolution, Subpart 2 nonetheless permits EPA to implement its revised ozone NAAQS. For all of the reasons set forth above, that premise is false.

Although some parties have suggested that this interpretation conflicts with the Court of Appeals' holding that the Administrator may *revise* the ozone NAAQS, *see, e.g.*, Mass. Br. 45-46, there is no conflict. Rather, the Administrator remains free to *promulgate* a lower (or higher) revised ozone NAAQS pursuant to her general revision authority under section 109. *See* Pet. App. 24a-36a. What she cannot do is *designate* areas as being in nonattainment with a *lower* revised NAAQS, since areas with ozone levels of 0.12 ppm or below could not be assigned classifications under Table 1. Instead, she must either designate such areas "unclassifiable," *see* CAA § 107(d)(1)(A)(iii), 42 U.S.C. § 7404(d)(1)(A)(iii), or (if she chooses) refrain from making a downward revision on the ground that such revision is not "appropriate" under these circumstances. *See* CAA § 109(d)(1), 42 U.S.C. § 7409(d)(1). If these options were not available, however, Subpart 2 would preclude the Administrator from promulgating a lower revised ozone NAAQS, as explained in the brief filed today by Ohio, Michigan, and West Virginia.

Although the statute precludes enforcement of an ozone NAAQS lower than the ozone NAAQS that was the subject of the 1990 Amendments, downward revisions nonetheless might be meaningful in at least three respects. *First*, and most obviously, Congress could authorize the enforcement of a revised ozone NAAQS if it believed that the Administrator had

shown that the need for implementation outweighed the need for the long-term approach of Subpart 2. Given its experience with EPA's implementation efforts under prior versions of Subpart 1, Congress presumably would accompany any such authorization with a new round of detailed Subpart 2-style implementation instructions. *Second*, even in the absence of congressional action, States could voluntarily comply with the new standard. *See* CAA § 116, 42 U.S.C. § 7416; *cf.* CAA § 181(c)(3), 42 U.S.C. § 7511(c)(3) (authorizing States to bind themselves voluntarily to higher classifications than required by Table 1). Such State action would be especially enabled by designation of local air-quality control regions as "unclassifiable," because then States (and their citizens) would know precisely which local areas did not comply with the stricter standard. *Third*, at the same time that it enacted Subpart 2, Congress also strengthened the Administrator's emergency powers to be used in the event that action were ever truly needed to prevent "an imminent and substantial endangerment to public health" (a stringent standard that is certainly not met on the record here, *see* Cross-Pet. Br. 6-7). *See* Pub. L. 101-549, 104 Stat. 2339, § 711(b) (Nov. 15, 1990) (amending CAA § 303, 42 U.S.C. § 7603). Congress has thus promoted attainment of the existing standard through a balanced approach that leaves some play in the statutory joints.

Given the Court of Appeals' plain-language holdings that the Administrator may *promulgate* lower revised ozone NAAQS, on the one hand, and must assign *classifications and attainment dates* only pursuant to Subpart 2, on the other, the only necessary qualification to the opinion below involves the Administrator's authority to give *nonattainment designations* to areas based on ozone NAAQS revisions that lead to a lower (more stringent) standard. Although the Court of Appeals concluded in a paragraph that she may do so, *see* Pet. App. 36a-37a, its cursory discussion of this intermediate issue was necessarily handicapped by briefing that was essentially nonexistent, due to the Administrator's insistence on reading

Subpart 2 out of the statute entirely. As noted above, the Act unambiguously states that "[*e*]*ach* area designated nonattainment for ozone pursuant to section 7407(d) [CAA § 107(d)] *shall* be classified at the time of such designation, under table 1," which provides classifications only for areas with design values above 0.12 ppm. *See* CAA § 181(a)(1), 42 U.S.C. § 7511(a)(1) (emphasis added). Because section 181(a)(1) thereby precludes EPA from designating as nonattainment an area with a design value at or below 0.12 ppm, the Agency cannot designate areas nonattainment with its revised NAAQS.

In opining to the contrary, the Court of Appeals apparently overlooked this point, as well as the possibility that areas could be designated unclassifiable. *See* Pet. App. 36a-37a. The lower court also appears to have read the qualifier "appropriate" out of section 109(b) by requiring the Administrator to revise the NAAQS whenever the health evidence warrants a revision, irrespective of whether the revised standard could be implemented. *See id.* Finally, the Court of Appeals may not have appreciated the automatic consequences that application of a "nonattainment" label triggers—consequences inconsistent with Congress' intention that ozone implementation against the States be conducted only under the Subpart 2 implementation regime. *See, e.g.*, CAA §§ 172(c), 173, 42 U.S.C. §§ 7502(c), 7503. Nonetheless, by far the most important point is that the Court of Appeals' interpretation, like ours but unlike the Administrator's, has the essential merit of recognizing Congress' basic intention that Subpart 2 not be declared stillborn.

B. Although the Subpart 2 Issues Are Ripe for Review, The Court Nonetheless May Decline to Decide Them.

The Court of Appeals correctly held that Subpart 2 revokes the Administrator's authority to implement lower revised ozone NAAQS, but this Court may nonetheless elect not to reach and

affirm that ruling. Specifically, because the Court has long insisted that it sits to review judgments, not statements in opinions, it may well decline to reach the Subpart 2 issues on grounds that they are not properly presented as this case is presently postured.

Ironically, the Administrator herself argues that this Court should not reach the Subpart 2 issue—albeit on the theory that those issues were not properly before the Court of Appeals. The Administrator contends, above all, that the Subpart 2 issues are not reviewable because she rendered a reviewable decision only on her authority to *promulgate* a revised ozone NAAQS, not on her authority to *implement* such a NAAQS. That argument is factually wrong—the Administrator did, quite consciously, render a reviewable decision on implementation issues. But even if she had not, the Administrator would still be wrong on the law. Specifically, although review of implementation issues in their own right was possible and appropriate, the Court of Appeals' Subpart 2 reasoning was also part of its explanation for its promulgation-authority decision *in favor* of the Administrator. The Administrator is hardly in a position to complain now that this favorable result was reached for the wrong reasons.

The Administrator's reviewability arguments are really just attempts to evade the precedential effects of a favorable decision. Indeed, the Administrator never argued that her decision was not final until *after* the Court of Appeals had issued its opinion containing the implementation statements that the Administrator now hopes to erase. *See* Pet. App. 77a. Until that time, the Administrator had argued repeatedly that the interplay between Subparts 1 and 2 *should* be resolved as soon as possible because "adoption of new NAAQS . . . could have profound implications for existing State implementation programs." 61 Fed. Reg. 65,716, 65,745 (Dec. 13, 1996). The Administrator therefore issued, together with her proposals for revising the ozone NAAQS, an Interim Implementation Policy

that concluded that "[t]he detailed provisions of subpart[] 2 . . . would not apply directly to the implementation of a new ozone NAAQS . . . ." 61 Fed. Reg. 65,752, 65,753 (Dec. 13, 1996). She also issued a separate advanced notice of proposed rulemaking on the implementation issues because "waiting until possible standard revisions are actually promulgated would, in the Agency's judgment, cause inevitable delays and disruptions in national, State and local efforts to achieve clean, healthy air, especially those related to attainment of the NAAQS for ozone." 61 Fed. Reg. 65,764 (Dec. 13, 1996). After receiving comments, she rendered her "[f]inal decision" on these issues together with her revised NAAQS. 62 Fed. Reg. at 38,873.

Not surprisingly, the Administrator's post-decision efforts to disown this openly-acknowledged "[f]inal decision," *id.*, rest on an attempted recasting of the record. For the most part, the Administrator claims that her final decision is not truly final because "[t]he sole purpose of [her] discussion [of Subpart 2] was to respond fully to the comments arguing that the 1990 Amendments curtailed EPA's authority to revise the ozone standard." EPA Br. 15; *see also id.* at 19, 34-35. She even goes so far as to emphasize this point by "reproducing the preamble discussion" in the Appendix to her brief. *Id.* at 15. What she fails to mention (at least not until a footnote much later on) is that she *also* addressed implementation issues in a separate portion of her rule "[i]n light of comments received regarding the interpretation proposed in the *Interim Implementation Policy*." 62 Fed. Reg. at 38,873 (emphasis added); *see* EPA Br. 39 n.26. It was there that she issued her "[f]inal decision" by explaining that she had "reconsidered [her] interpretation and now believes that . . . the provisions of Subpart 2 continue to apply to O_3 nonattainment areas for purposes of achieving attainment of the current 1-hour standard," but that only "the provisions of Subpart 1," *not* Subpart 2, "would apply to the implementation of the new 8-hour O_3 standards." 62 Fed. Reg. at 38,873.

Although the Administrator now pretends that this "preamble discussion" was idle musing, *see, e.g.*, EPA Br. 15, she codified her Subpart 2 ruling in 40 C.F.R. § 50.9(b), *see* 62 Fed. Reg. at 38,894. Moreover, this ruling formed the explicit basis for the "Implementation Plan for Revised Air Quality Standards" issued together with the revised NAAQS. *See* 62 Fed. Reg. 38,421, 38,423, 38,424-27 (July 18, 1997). Indeed, the plan produced by this purportedly idle musing formed the foundation for three different final rules revoking the prior ozone NAAQS in three different sets of areas. *See* 64 Fed. Reg. 30,911 (June 9, 1999); 63 Fed. Reg. 39,432 (July 22, 1998); 63 Fed. Reg. 31,014 (June 5, 1998).

The Administrator's other footnote contention is that the implementation aspects of her final rule were not challenged before the D.C. Circuit. *See* EPA Br. 39 n.26. In fact, however, numerous parties challenged the entire rule, and the Administrator herself acknowledged the implementation plan's importance by briefing section 50.9(b) and the preamble implementation statements before the Court of Appeals. *See* Resp. Br. in D.C. Cir. No. 97-1441, at 72. Moreover, at the very same time that she sought rehearing below by arguing that implementation issues should not have been decided in this case, the Administrator was arguing before a different D.C. Circuit panel that a separate petition for review challenging her actual implementation of the revised NAAQS was barred *precisely because her Subpart 2 interpretation had been properly challenged in this case*. *See* Resp. Br. in D.C. Cir. No. 98-1363 (filed June 21, 1999), at 27-28, 29-30.

In sum, the Administrator's finality and ripeness arguments amount to an "administrative law shell game," *AT&T Co. v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992), that is being played, not with considered characterizations of actual administrative actions, but with moving targets repositioned from day to day with an eye to expanding or contracting the preclusive scope of the decision below as necessary for the

needs of the moment. The Administrator's "[f]inal decision" is indeed final agency action ripe for review, as further explained in the brief filed today by Ohio, Michigan, and West Virginia.

But even if the Administrator were correct that promulgation was the *only* reviewable issue before the Court of Appeals, the propriety of that court's engaging in its Subpart 2 discussion would still be beyond dispute. There is no question that, despite the finality and ripeness of the Administrator's implementation decisions, the true focus of the implementation debate in the Court of Appeals was squarely on the argument by parties to the ozone rulemaking that Subpart 2 precludes any revision of the ozone NAAQS because, as a matter of law, revisions that may not be implemented are not "appropriate" for promulgation. *See* EPA Br. 34 (agreeing that the promulgation issue was properly before the D.C. Circuit). Confronted with this promulgation argument resting on an implementation premise, the Court of Appeals both (1) brought to bear the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, including an analysis of the statute as a whole, and (2) used as a starting point the Administrator's own principal defense—specifically, the extreme claim that Subpart 2 places no limits whatever on implementation of a revised ozone NAAQS.

When the Court of Appeals' decision was handed down, however, the Administrator suddenly announced her disagreement, not with that Court's favorable (for her) resolution of the promulgation issue, but rather with statements in its ensuing discussion. She now seeks review of those statements—statements made over the course of a statutory analysis concededly within the Court of Appeals' jurisdiction. Seen in this light, it is evident that the Administrator's Subpart 2 claims, at bottom, seek only to lessen the *stare decisis* effects of the reasoning the lower court used on its way to a result favorable to the Administrator. This easily explains

her attenuated charges of lack of finality and ripeness, which, if accepted, would provide the basis for seeking to deprive the Subpart 2 decision below of precedential effect, on the grounds that the Subpart 2 issues were not justiciable *when decided*. *Compare, e.g., Mahoney v. Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997) ("[T]here is no particular reason to assume that a decision, later mooted, is any less valid as precedent than any other opinion of a court.").

None of this is to say that the Subpart 2 statutory issues are not important; they are. The D.C. Circuit's holdings regarding implementation of revised ozone NAAQS addressed matters squarely presented by the parties and necessarily decided by the court (in contrast, for example, to the question regarding designations as "nonattainment"). The Court of Appeals' implementation discussion (unlike its designations discussion) is therefore not *obiter dictum*, but an important part of the rationale for its decision respecting the Administrator's promulgation authority. As such, the implementation discussion (though not its designation discussion) is now entitled to full *stare decisis* or law-of-the-case effect in future proceedings. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (*stare decisis* applies to the result and "those portions of the opinion necessary to th[e] result;" other portions of opinion are *dictum*); *compare, e.g., Montana v. Crow Tribe of Indians*, 523 U.S. 696 n.11 (1998) (law-of-the-case doctrine does not apply to *dictum*); *Hahn v. United States*, 524 U.S. 236, 251 (1998) (*stare decisis* principles relaxed where issue not fully briefed); *Association of Inv. Brokers v. SEC*, 676 F.2d 857, 863 (D.C. Cir. 1982) (same re law-of-the-case doctrine).

But even conceding its importance for future litigation, the irregularity of Subpart 2's procedural posture is undeniable. That irregularity is underscored once one appreciates the extent to which the Administrator's arguments for why these Subpart 2 issues are not final or ripe depend upon the order in which the D.C. Circuit's opinion treats various issues. In

particular, if the D.C. Circuit had instead framed its opinion to reflect the context in which Subpart 2 issues actually arose, it would have noted first that industry and States had raised claims that Subpart 2 (together with related provisions) precludes promulgation of revised standards. It would have then discussed its reasons for rejecting EPA's primary defense to that claim (the argument that Subpart 1, not Subpart 2, governs revised NAAQS). And finally, it would have concluded with its reasons for nonetheless rejecting the promulgation claim on alternative grounds. Had the court below issued *that* opinion—instead of one helpfully and quite innocently reordering the issues into a more comprehensible framework—there could be no claim that the D.C. Circuit reached out to decide anything. There also could be only the most attenuated claims that the Subpart 2 issues are of the sort typically deemed worthy of this Court's attention.

Indeed, merely to state this procedural posture is to call into question the necessity for the Court to address Subpart 2. The Administrator's attempt to induce the Court to erase the precedential effect of the D.C. Circuit's Subpart 2 discussion certainly may cross the "long line of decisions rejecting claims of standing based merely on supposed adverse precedential effect." *Williams Gas Processing-Gulf Coast Co. v. FERC*, 145 F.3d 377 (D.C. Cir. 1998); *see also, e.g., Boston Tow Boat Co. v. United States*, 321 U.S. 632, 632-34 (1944). Moreover, this quarrel over precedent also implicates the rule that the Court does not sit to judge the reasoning, as opposed to results, of lower court decisions. Typically, a lower court's "use of analysis that may have been adverse" to a government agency's "long-term interests" does not permit the agency "to claim status as a losing party for purposes of this Court's review." *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam*). It thus has been stressed repeatedly that the Court reviews "judgments, not statements in opinions." *See, e.g., Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., respecting denial of *certiorari*).

Because the Administrator is concerned with the reasoning and not the result of the Subpart 2 holding below, a concluding word respecting the technical disposition of this case is in order. Ordinarily, when the Court inadvertently grants *certiorari* on issues that go only to the rationale of the lower court decision, the proper course is to dismiss *certiorari* "as improvidently granted." That is what occurred in *Rooney* even after full "briefing and oral argument." *Rooney*, 483 U.S. at 311. But here, unlike in *Rooney*, these cases will not go away, given the petition and cross-petition on undoubtedly live issues that are addressed in Part I of this brief. Accordingly, there is no need or occasion here to dismiss questions 2 and 3 of the Administrator's petition. Rather, the Court may elect to issue binding rulings on only the issues detailed in the cross-petition and Part I of this brief, followed by its usual practice of remanding with instructions for further lower court action in light of its decision.

CONCLUSION

For the foregoing reasons, the nondelegation holding should be affirmed, but need not be reached if this Court reverses on the grounds set forth in our brief as cross-petitioners. The challenged Subpart 2 implementation holding is also correct, but this Court need not reach that issue, since the Administrator is seeking review of the rationale used to reach a result in her favor. Accordingly, the Court should consider this case together with the cross-petition, vacate the ozone and particulate matter NAAQS for the reasons spelled out in our brief as cross-petitioners and elaborated on in Part I of this brief, and remand to the D.C. Circuit for further proceedings consistent with its opinion.

Respectfully submitted,

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APPENDIX

CAA § 107, 42 U.S.C. § 7407. Air quality control regions

(a) Responsibility of each State for air quality; submission of implementation plan

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) Designated regions

For purposes of developing and carrying out implementation plans under section 7410 of this title—

(1) an air quality control region designated under this section before December 31, 1970, or a region designated after such date under subsection (c) of this section, shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) Authority of Administrator to designate regions; notification of Governors of affected States

The Administrator shall, within 90 days after December 31, 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall

immediately notify the Governors of the affected States of any designation made under this subsection.

(d) Designations

(1) Designations generally

(A) Submission by Governors of initial designations following promulgation of new or revised standards

By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised national ambient air quality standard for any pollutant under section 7409 of this title, the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—

(i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant,

(ii) attainment, any area (other than an area identified in clause (i)) that meets the national primary or secondary ambient air quality standard for the pollutant, or

(iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the national primary or secondary ambient air quality standard for the pollutant.

The Administrator may not require the Governor to submit the required list sooner than 120 days after promulgating a new or revised national ambient air quality standard.

(B) Promulgation by EPA of designations

(i) Upon promulgation or revision of a national ambient air quality standard, the Administrator shall promulgate the designations of all areas (or portions thereof) submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard. Such period may be extended for up to one year in the event the Administrator has insufficient information to promulgate the designations.

(ii) In making the promulgations required under clause (i), the Administrator may make such modifications as the Administrator deems necessary to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof). Whenever the Administrator intends to make a modification, the Administrator shall notify the State and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate. The Administrator shall give such notification no later than 120 days before the date the Administrator promulgates the designation, including any modification thereto. If the Governor fails to submit the list in whole or in part, as required under subparagraph (A), the Administrator shall promulgate the designation that the Administrator deems appropriate for any area (or portion thereof) not designated by the State.

(iii) If the Governor of any State, on the Governor's own motion, under subparagraph (A), submits a list of areas (or portions thereof) in the State designated as nonattainment, attainment, or unclassifiable, the Administrator shall act on such designations in accordance with the procedures under paragraph (3) (relating to redesignation).

(iv) A designation for an area (or portion thereof) made pursuant to this subsection shall remain in effect until the area (or portion thereof) is redesignated pursuant to paragraph (3) or (4).

(C) Designations by operation of law

(i) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(A), (B), or (C) of this subsection (as in effect immediately before November 15,

1990) is designated, by operation of law, as a nonattainment area for such pollutant within the meaning of subparagraph (A)(i).

(ii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(E) (as in effect immediately before November 15, 1990) is designated by operation of law, as an attainment area for such pollutant within the meaning of subparagraph (A)(ii).

(iii) Any area designated with respect to any air pollutant under the provisions of paragraph (1)(D) (as in effect immediately before November 15, 1990) is designated, by operation of law, as an unclassifiable area for such pollutant within the meaning of subparagraph (A)(iii).

(2) Publication of designations and redesignations

(A) The Administrator shall publish a notice in the Federal Register promulgating any designation under paragraph (1) or (5), or announcing any designation under paragraph (4), or promulgating any redesignation under paragraph (3).

(B) Promulgation or announcement of a designation under paragraph (1), (4) or (5) shall not be subject to the provisions of sections 553 through 557 of Title 5 (relating to notice and comment), except nothing herein shall be construed as precluding such public notice and comment whenever possible.

(3) Redesignation

(A) Subject to the requirements of subparagraph (E), and on the basis of air quality data, planning and control considerations, or any other air quality- related considerations the Administrator deems appropriate, the Administrator may at any time notify the Governor of any State that available information indicates that the designation of any area or portion of an area within the State or interstate area should be revised. In issuing such notification, which shall be public, to the Governor, the Administrator shall provide such information as

the Administrator may have available explaining the basis for the notice.

(B) No later than 120 days after receiving a notification under subparagraph (A), the Governor shall submit to the Administrator such redesignation, if any, of the appropriate area (or areas) or portion thereof within the State or interstate area, as the Governor considers appropriate.

(C) No later than 120 days after the date described in subparagraph (B) (or paragraph (1)(B)(iii)), the Administrator shall promulgate the redesignation, if any, of the area or portion thereof, submitted by the Governor in accordance with subparagraph (B), making such modifications as the Administrator may deem necessary, in the same manner and under the same procedure as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with subparagraph (B), a redesignation for an area (or portion thereof) identified by the Administrator under subparagraph (A), the Administrator shall promulgate such redesignation, if any, that the Administrator deems appropriate.

(D) The Governor of any State may, on the Governor's own motion, submit to the Administrator a revised designation of any area or portion thereof within the State. Within 18 months of receipt of a complete State redesignation submittal, the Administrator shall approve or deny such redesignation. The submission of a redesignation by a Governor shall not affect the effectiveness or enforceability of the applicable implementation plan for the State.

(E) The Administrator may not promulgate a redesignation of a nonattainment area (or portion thereof) to attainment unless—

(i) the Administrator determines that the area has attained the national ambient air quality standard;

(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;

(iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;

(iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and

(v) the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter.

(F) The Administrator shall not promulgate any redesignation of any area (or portion thereof) from nonattainment to unclassifiable.

(4) Nonattainment designations for ozone, carbon monoxide and particulate matter (PM-10)

(A) Ozone and carbon monoxide

(i) Within 120 days after November 15, 1990, each Governor of each State shall submit to the Administrator a list that designates, affirms or reaffirms the designation of, or redesignates (as the case may be), all areas (or portions thereof) of the Governor's State as attainment, nonattainment, or unclassifiable with respect to the national ambient air quality standards for ozone and carbon monoxide.

(ii) No later than 120 days after the date the Governor is required to submit the list of areas (or portions thereof) required under clause (i) of this subparagraph, the Administrator shall promulgate such designations, making such modifications as the Administrator may deem necessary, in the same manner,

and under the same procedure, as is applicable under clause (ii) of paragraph (1)(B), except that the phrase "60 days" shall be substituted for the phrase "120 days" in that clause. If the Governor does not submit, in accordance with clause (i) of this subparagraph, a designation for an area (or portion thereof), the Administrator shall promulgate the designation that the Administrator deems appropriate.

(iii) No nonattainment area may be redesignated as an attainment area under this subparagraph.

(iv) Notwithstanding paragraph (1)(C)(ii) of this subsection, if an ozone or carbon monoxide nonattainment area located within a metropolitan statistical area or consolidated metropolitan statistical area (as established by the Bureau of the Census) is classified under part D of this subchapter as a Serious, Severe, or Extreme Area, the boundaries of such area are hereby revised (on the date 45 days after such classification) by operation of law to include the entire metropolitan statistical area or consolidated metropolitan statistical area, as the case may be, unless within such 45-day period the Governor (in consultation with State and local air pollution control agencies) notifies the Administrator that additional time is necessary to evaluate the application of clause (v). Whenever a Governor has submitted such a notice to the Administrator, such boundary revision shall occur on the later of the date 8 months after such classification or 14 months after November 15, 1990, unless the Governor makes the finding referred to in clause (v), and the Administrator concurs in such finding, within such period. Except as otherwise provided in this paragraph, a boundary revision under this clause or clause (v) shall apply for purposes of any State implementation plan revision required to be submitted after November 15, 1990.

(v) Whenever the Governor of a State has submitted a notice under clause (iv), the Governor, in consultation with State and local air pollution control agencies, shall undertake a study to evaluate whether the entire metropolitan statistical area

or consolidated metropolitan statistical area should be included within the nonattainment area. Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan statistical area or consolidated metropolitan statistical area, sources in the portion do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. In making such finding, the Governor and the Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions, and pollution transport.

(B) PM-10 designations

By operation of law, until redesignation by the Administrator pursuant to paragraph (3)—

(i) each area identified in 52 Federal Register 29383 (Aug. 7, 1987) as a Group I area (except to the extent that such identification was modified by the Administrator before November 15, 1990) is designated nonattainment for PM-10;

(ii) any area containing a site for which air quality monitoring data show a violation of the national ambient air quality standard for PM-10 before January 1, 1989 (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for PM- 10; and

(iii) each area not described in clause (i) or (ii) is hereby designated unclassifiable for PM-10. Any designation for particulate matter (measured in terms of total suspended particulates) that the Administrator promulgated pursuant to this subsection (as in effect immediately before November 15, 1990) shall remain in effect for purposes of implementing the maximum allowable increases in concentrations of particulate

matter (measured in terms of total suspended particulates) pursuant to section 7473(b) of this title, until the Administrator determines that such designation is no longer necessary for that purpose.

(5) Designations for lead

The Administrator may, in the Administrator's discretion at any time the Administrator deems appropriate, require a State to designate areas (or portions thereof) with respect to the national ambient air quality standard for lead in effect as of November 15, 1990, in accordance with the procedures under subparagraphs (A) and (B) of paragraph (1), except that in applying subparagraph (B)(i) of paragraph (1) the phrase "2 years from the date of promulgation of the new or revised national ambient air quality standard" shall be replaced by the phrase "1 year from the date the Administrator notifies the State of the requirement to designate areas with respect to the standard for lead".

(e) Redesignation of air quality control regions

(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all

States which the Administrator determines may be significantly affected.

(3) No compliance date extension granted under section 7413(d)(5) of this title (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 7413(d)(5) of this title if the violation of such limitation is due solely to a redesignation of a region under this subsection.

CAA § 172, 42 U.S.C. § 7502. Nonattainment plan provisions in general

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final

action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year. No more than 2 one-year extensions may be issued under this subparagraph for a single nonattainment area.

(D) This paragraph shall not apply with respect to nonattainment areas for which attainment dates are specifically provided under other provisions of this part.

(b) Schedule for plan submissions

At the time the Administrator promulgates the designation of an area as nonattainment with respect to a national ambient air quality standard under section 7407(d) of this title, the Administrator shall establish a schedule according to which the State containing such area shall submit a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision (including the plan items) meeting the applicable requirements of subsection (c) of this section and section 7410(a)(2) of this title.

(c) Nonattainment plan provisions

The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

(1) In general

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control

technology) and shall provide for attainment of the national primary ambient air quality standards.

(2) RFP

Such plan provisions shall require reasonable further progress.

(3) Inventory

Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

(4) Identification and quantification

Such plan provisions shall expressly identify and quantify the emissions, if any, of any such pollutant or pollutants which will be allowed, in accordance with section 7503(a)(1)(B) of this title, from the construction and operation of major new or modified stationary sources in each such area. The plan shall demonstrate to the satisfaction of the Administrator that the emissions quantified for this purpose will be consistent with the achievement of reasonable further progress and will not interfere with attainment of the applicable national ambient air quality standard by the applicable attainment date.

(5) Permits for new and modified major stationary sources

Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.

(6) Other measures

Such plan provisions shall include enforceable emission limitations, and such other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emission rights), as well as

schedules and timetables for compliance, as may be necessary or appropriate to provide for attainment of such standard in such area by the applicable attainment date specified in this part.

(7) Compliance with section 7410(a)(2)

Such plan provisions shall also meet the applicable provisions of section 7410(a)(2) of this title.

(8) Equivalent techniques

Upon application by any State, the Administrator may allow the use of equivalent modeling, emission inventory, and planning procedures, unless the Administrator determines that the proposed techniques are, in the aggregate, less effective than the methods specified by the Administrator.

(9) Contingency measures

Such plan shall provide for the implementation of specific measures to be undertaken if the area fails to make reasonable further progress, or to attain the national primary ambient air quality standard by the attainment date applicable under this part. Such measures shall be included in the plan revision as contingency measures to take effect in any such case without further action by the State or the Administrator.

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(e) Future modification of standard

If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

CAA § 181, 42 U.S.C. § 7511. Classifications and attainment dates

(a) Classification and attainment dates for 1989 nonattainment areas

(1) Each area designated nonattainment for ozone pursuant to section 7407(d) of this title shall be classified at the time of such designation, under table 1, by operation of law, as a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for ozone shall be as expeditiously as practicable but not later than the date provided in table 1.

TABLE 1

Area class	Design value	Primary standard attainment date
Marginal	0.121 up to 0.138	3 years after November 15, 1990
Moderate	0.138 up to 0.160	6 years after November 15, 1990
Serious	0.160 up to 0.180	9 years after November 15, 1990
Severe	0.180 up to 0.280	15 years after November 15, 1990
Extreme	0.280 and above	20 years after November 15, 1990

(2) Notwithstanding table 1, in the case of a severe area with a 1988 ozone design value between 0.190 and 0.280 ppm, the attainment date shall be 17 years (in lieu of 15 years) after November 15, 1990.

(3) At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each

ozone nonattainment area, the Administrator shall publish a notice announcing the classification of such ozone nonattainment area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice and comment and judicial review) shall apply to such classification.

(4) If an area classified under paragraph (1) (Table 1) would have been classified in another category if the design value in the area were 5 percent greater or 5 percent less than the level on which such classification was based, the Administrator may, in the Administrator's discretion, within 90 days after the initial classification, by the procedure required under paragraph (3), adjust the classification to place the area in such other category. In making such adjustment, the Administrator may consider the number of exceedances of the national primary ambient air quality standard for ozone in the area, the level of pollution transport between the area and other affected areas, including both intrastate and interstate transport, and the mix of sources and air pollutants in the area.

(5) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the date specified in table 1 of paragraph (1) of this subsection if—

(A) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(B) no more than 1 exceedance of the national ambient air quality standard level for ozone has occurred in the area in the year preceding the Extension Year. No more than 2 one-year extensions may be issued under this paragraph for a single nonattainment area.

(b) New designations and reclassifications

(1) New designations to nonattainment

Any area that is designated attainment or unclassifiable for ozone under section 7407(d)(4) of this title, and that is subsequently redesignated to nonattainment for ozone under section 7407(d)(3) of this title, shall, at the time of the redesignation, be classified by operation of law in accordance with table 1 under subsection (a) of this section. Upon its classification, the area shall be subject to the same requirements under section 7410 of this title, subpart 1 of this part, and this subpart that would have applied had the area been so classified at the time of the notice under subsection (a)(3) of this section, except that any absolute, fixed date applicable in connection with any such requirement is extended by operation of law by a period equal to the length of time between November 15, 1990, and the date the area is classified under this paragraph.

(2) Reclassification upon failure to attain

(A) Within 6 months following the applicable attainment date (including any extension thereof) for an ozone nonattainment area, the Administrator shall determine, based on the area's design value (as of the attainment date), whether the area attained the standard by that date. Except for any Severe or Extreme area, any area that the Administrator finds has not attained the standard by that date shall be reclassified by operation of law in accordance with table 1 of subsection (a) of this section to the higher of—

(i) the next higher classification for the area, or

(ii) the classification applicable to the area's design value as determined at the time of the notice required under subparagraph (B). No area shall be reclassified as Extreme under clause (ii).

(B) The Administrator shall publish a notice in the Federal Register, no later than 6 months following the attainment date,

identifying each area that the Administrator has determined under subparagraph (A) as having failed to attain and identifying the reclassification, if any, described under subparagraph (A).

(3) Voluntary reclassification

The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with table 1 of subsection (a) of this section to a higher classification. The Administrator shall publish a notice in the Federal Register of any such request and of action by the Administrator granting the request.

(4) Failure of Severe Areas to attain standard

(A) If any Severe Area fails to achieve the national primary ambient air quality standard for ozone by the applicable attainment date (including any extension thereof), the fee provisions under section 7511d of this title shall apply within the area, the percent reduction requirements of section 7511a(c)(2)(B) and (C) of this title (relating to reasonable further progress demonstration and NO subx control) shall continue to apply to the area, and the State shall demonstrate that such percent reduction has been achieved in each 3-year interval after such failure until the standard is attained. Any failure to make such a demonstration shall be subject to the sanctions provided under this part.

(B) In addition to the requirements of subparagraph (A), if the ozone design value for a Severe Area referred to in subparagraph (A) is above 0.140 ppm for the year of the applicable attainment date, or if the area has failed to achieve its most recent milestone under section 7511a(g) of this title, the new source review requirements applicable under this subpart in Extreme Areas shall apply in the area and the term[s] "major source" and "major stationary source" shall have the same meaning as in Extreme Areas.

(C) In addition to the requirements of subparagraph (A) for those areas referred to in subparagraph (A) and not covered by subparagraph (B), the provisions referred to in subparagraph (B) shall apply after 3 years from the applicable attainment date unless the area has attained the standard by the end of such 3-year period.

(D) If, after November 15, 1990, the Administrator modifies the method of determining compliance with the national primary ambient air quality standard, a design value or other indicator comparable to 0.140 in terms of its relationship to the standard shall be used in lieu of 0.140 for purposes of applying the provisions of subparagraphs (B) and (C).

(c) References to terms

(1) Any reference in this subpart to a "Marginal Area", a "Moderate Area", a "Serious Area", a "Severe Area", or an "Extreme Area" shall be considered a reference to a Marginal Area, a Moderate Area, a Serious Area, a Severe Area, or an Extreme Area as respectively classified under this section.

(2) Any reference in this subpart to "next higher classification" or comparable terms shall be considered a reference to the classification related to the next higher set of design values in table 1.

CAA § 182, 42 U.S.C. § 7511a. Plan submissions and requirements

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(d) Severe Areas

Each State in which all or part of a Severe Area is located shall, with respect to the Severe Area, make the submissions described under subsection (c) of this section (relating to Serious Areas), and shall also submit the revisions to the applicable implementation plan (including the plan items) described under this subsection. For any Severe Area, the terms

"major source" and "major stationary source" include (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 25 tons per year of volatile organic compounds.

(1) Vehicle miles traveled

(A) Within 2 years after November 15, 1990, the State shall submit a revision that identifies and adopts specific enforceable transportation control strategies and transportation control measures to offset any growth in emissions from growth in vehicle miles traveled or numbers of vehicle trips in such area and to attain reduction in motor vehicle emissions as necessary, in combination with other emission reduction requirements of this subpart, to comply with the requirements of subsection (b)(2)(B) and (c)(2)(B) of this section (pertaining to periodic emissions reduction requirements). The State shall consider measures specified in section 7408(f) of this title, and choose from among and implement such measures as necessary to demonstrate attainment with the national ambient air quality standards; in considering such measures, the State should ensure adequate access to downtown, other commercial, and residential areas and should avoid measures that increase or relocate emissions and congestion rather than reduce them.

(B) The State may also, in its discretion, submit a revision at any time requiring employers in such area to implement programs to reduce work-related vehicle trips and miles travelled by employees. Such revision shall be developed in accordance with guidance issued by the Administrator pursuant to section 7408(f) of this title and may require that employers in such area increase average passenger occupancy per vehicle in commuting trips between home and the workplace during peak travel periods. The guidance of the Administrator may specify average vehicle occupancy rates which vary for locations within a nonattainment area (suburban, center city,

business district) or among nonattainment areas reflecting existing occupancy rates and the availability of high occupancy modes. Any State required to submit a revision under this subparagraph (as in effect before December 23, 1995) containing provisions requiring employers to reduce work-related vehicle trips and miles travelled by employees may, in accordance with State law, remove such provisions from the implementation plan, or withdraw its submission, if the State notifies the Administrator, in writing, that the State has undertaken, or will undertake, one or more alternative methods that will achieve emission reductions equivalent to those to be achieved by the removed or withdrawn provisions.

(2) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.3 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(3) Enforcement under section 7511d

By December 31, 2000, the State shall submit a plan revision which includes the provisions required under section 7511d of this title. Any reference to the term "attainment date" in subsection (b) or (c) of this section, which is incorporated by reference into this subsection (d), shall refer to the attainment date for Severe Areas.

(e) Extreme Areas

Each State in which all or part of an Extreme Area is located shall, with respect to the Extreme Area, make the submissions described under subsection (d) of this section (relating to Severe Areas), and shall also submit the revisions to the applicable implementation plan (including the plan

items) described under this subsection. The provisions of clause (ii) of subsection (c)(2)(B) of this section (relating to reductions of less than 3 percent), the provisions of parag[r]aphs (6), (7) and (8) of subsection (c) of this section (relating to de minim[i]s rule and modification of sources), and the provisions of clause (ii) of subsection (b)(1)(A) of this section (relating to reductions of less than 15 percent) shall not apply in the case of an Extreme Area. For any Extreme Area, the terms "major source" and "major stationary source" includes (in addition to the sources described in section 7602 of this title) any stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 10 tons per year of volatile organic compounds.

(1) Offset requirement

For purposes of satisfying the offset requirements pursuant to this part, the ratio of total emission reductions of VOCs to total increased emissions of such air pollutant shall be at least 1.5 to 1, except that if the State plan requires all existing major sources in the nonattainment area to use best available control technology (as defined in section 7479(3) of this title) for the control of volatile organic compounds, the ratio shall be at least 1.2 to 1.

(2) Modifications

Any change (as described in section 7411(a)(4) of this title) at a major stationary source which results in any increase in emissions from any discrete operation, unit, or other pollutant emitting activity at the source shall be considered a modification for purposes of section 7502(c)(5) of this title and section 7503(a) of this title, except that for purposes of complying with the offset requirement pursuant to section 7503(a)(1) of this title, any such increase shall not be considered a modification if the owner or operator of the source elects to offset the increase by a greater reduction in emissions

of the air pollutant concerned from other discrete operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1. The offset requirements of this part shall not be applicable in Extreme Areas to a modification of an existing source if such modification consists of installation of equipment required to comply with the applicable implementation plan, permit, or this chapter.

(3) Use of clean fuels or advanced control technology

For Extreme Areas, a plan revision shall be submitted within 3 years after November 15, 1990, to require, effective 8 years after November 15, 1990, that each new, modified, and existing electric utility and industrial and commercial boiler which emits more than 25 tons per year of oxides of nitrogen—

(A) burn as its primary fuel natural gas, methanol, or ethanol (or a comparably low polluting fuel), or

(B) use advanced control technology (such as catalytic control technology or other comparably effective control methods) for reduction of emissions of oxides of nitrogen. For purposes of this subsection, the term "primary fuel" means the fuel which is used 90 percent or more of the operating time. This paragraph shall not apply during any natural gas supply emergency (as defined in title III of the Natural Gas Policy Act of 1978 [15 U.S.C.A. § 3361 et seq.]).

(4) Traffic control measures during heavy traffic hours

For Extreme Areas, each implementation plan revision under this subsection may contain provisions establishing traffic control measures applicable during heavy traffic hours to reduce the use of high polluting vehicles or heavy-duty vehicles, notwithstanding any other provision of law.

(5) New technologies

The Administrator may, in accordance with section 7410 of this title, approve provisions of an implementation plan for an Extreme Area which anticipate development of new control

techniques or improvement of existing control technologies, and an attainment demonstration based on such provisions, if the State demonstrates to the satisfaction of the Administrator that—

(A) such provisions are not necessary to achieve the incremental emission reductions required during the first 10 years after November 15, 1990; and

(B) the State has submitted enforceable commitments to develop and adopt contingency measures to be implemented as set forth herein if the anticipated technologies do not achieve planned reductions. Such contingency measures shall be submitted to the Administrator no later than 3 years before proposed implementation of the plan provisions and approved or disapproved by the Administrator in accordance with section 7410 of this title. The contingency measures shall be adequate to produce emission reductions sufficient, in conjunction with other approved plan provisions, to achieve the periodic emission reductions required by subsection (b)(1) or (c)(2) of this section and attainment by the applicable dates. If the Administrator determines that an Extreme Area has failed to achieve an emission reduction requirement set forth in subsection (b)(1) or (c)(2) of this section, and that such failure is due in whole or part to an inability to fully implement provisions approved pursuant to this subsection, the Administrator shall require the State to implement the contingency measures to the extent necessary to assure compliance with subsections (b)(1) and (c)(2) of this section.

Any reference to the term "attainment date" in subsection (b), (c), or (d) of this section which is incorporated by reference into this subsection, shall refer to the attainment date for Extreme Areas.

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CAA § 183, 42 U.S.C. § 7511b. Federal ozone measures

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(g) Ozone design value study

The Administrator shall conduct a study of whether the methodology in use by the Environmental Protection Agency as of November 15, 1990, for establishing a design value for ozone provides a reasonable indicator of the ozone air quality of ozone nonattainment areas. The Administrator shall obtain input from States, local subdivisions thereof, and others. The study shall be completed and a report submitted to Congress not later than 3 years after November 15, 1990. The results of the study shall be subject to peer and public review before submitting it to Congress.

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CAA § 185, 42 U.S.C. § 7511d. Enforcement for Severe and Extreme ozone nonattainment areas for failure to attain

(a) General rule

Each implementation plan revision required under section 7511a(d) and (e) of this title (relating to the attainment plan for Severe and Extreme ozone nonattainment areas) shall provide that, if the area to which such plan revision applies has failed to attain the national primary ambient air quality standard for ozone by the applicable attainment date, each major stationary source of VOCs located in the area shall, except as otherwise provided under subsection (c) of this section, pay a fee to the State as a penalty for such failure, computed in accordance with subsection (b) of this section, for each calendar year beginning after the attainment date, until the area is redesignated as an attainment area for ozone. Each such plan revision should include procedures for assessment and collection of such fees.

(b) Computation of fee

(1) Fee amount

The fee shall equal $5,000, adjusted in accordance with paragraph (3), per ton of VOC emitted by the source during the calendar year in excess of 80 percent of the baseline amount, computed under paragraph (2).

(2) Baseline amount

For purposes of this section, the baseline amount shall be computed, in accordance with such guidance as the Administrator may provide, as the lower of the amount of actual VOC emissions ("actuals") or VOC emissions allowed under the permit applicable to the source (or, if no such permit has been issued for the attainment year, the amount of VOC emissions allowed under the applicable implementation plan ("allowables")) during the attainment year. Notwithstanding the preceding sentence, the Administrator may issue guidance authorizing the baseline amount to be determined in accordance with the lower of average actuals or average allowables, determined over a period of more than one calendar year. Such guidance may provide that such average calculation for a specific source may be used if that source's emissions are irregular, cyclical, or otherwise vary significantly from year to year.

(3) Annual adjustment

The fee amount under paragraph (1) shall be adjusted annually, beginning in the year beginning after 1990, in accordance with section 7661a(b)(3)(B)(v) of this section (relating to inflation adjustment).

(c) Exception

Notwithstanding any provision of this section, no source shall be required to pay any fee under subsection (a) of this section with respect to emissions during any year that is treated as an Extension Year under section 7511(a)(5) of this title.

(d) Fee collection by Administrator

If the Administrator has found that the fee provisions of the implementation plan do not meet the requirements of this section, or if the Administrator makes a finding that the State is not administering and enforcing the fee required under this section, the Administrator shall, in addition to any other action authorized under this subchapter, collect, in accordance with procedures promulgated by the Administrator, the unpaid fees required under subsection (a) of this section. If the Administrator makes such a finding under section 7509(a)(4) of this title, the Administrator may collect fees for periods before the determination, plus interest computed in accordance with section 6621(a)(2) of Title 26 (relating to computation of interest on underpayment of Federal taxes), to the extent the Administrator finds such fees have not been paid to the State. The provisions of clauses (ii) through (iii) of section 7661a(b)(3)(C) of this title (relating to penalties and use of the funds, respectively) shall apply with respect to fees collected under this subsection.

(e) Exemptions for certain small areas

For areas with a total population under 200,000 which fail to attain the standard by the applicable attainment date, no sanction under this section or under any other provision of this chapter shall apply if the area can demonstrate, consistent with guidance issued by the Administrator, that attainment in the area is prevented because of ozone or ozone precursors transported from other areas. The prohibition applies only in cases in which the area has met all requirements and implemented all measures applicable to the area under this chapter.

CAA § 186, 42 U.S.C. § 7512. Classification and attainment dates

(a) Classification by operation of law and attainment dates for nonattainment areas

(1) Each area designated nonattainment for carbon monoxide pursuant to section 7407(d) of this title shall be classified at the time of such designation under table 1, by operation of law, as a Moderate Area or a Serious Area based on the design value for the area. The design value shall be calculated according to the interpretation methodology issued by the Administrator most recently before November 15, 1990. For each area classified under this subsection, the primary standard attainment date for carbon monoxide shall be as expeditiously as practicable but not later than the date provided in table 1:

TABLE [1]

Area classification	Design value	Primary standard attainment date
Moderate	9.1-16.4 ppm	December 31, 1995
Serious	16.5 and above	December 31, 2000

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CAA § 188, 42 U.S.C. § 7513. Classifications and attainment dates

(a) Initial classifications

Every area designated nonattainment for PM-10 pursuant to section 7407(d) of this title shall be classified at the time of such designation, by operation of law, as a moderate PM-10 nonattainment area (also referred to in this subpart as a

"Moderate Area") at the time of such designation. At the time of publication of the notice under section 7407(d)(4) of this title (relating to area designations) for each PM-10 nonattainment area, the Administrator shall publish a notice announcing the classification of such area. The provisions of section 7502(a)(1)(B) of this title (relating to lack of notice-and-comment and judicial review) shall apply with respect to such classification.

(b) Reclassification as Serious

(1) Reclassification before attainment date

The Administrator may reclassify as a Serious PM-10 nonattainment area (identified in this subpart also as a "Serious Area") any area that the Administrator determines cannot practicably attain the national ambient air quality standard for PM-10 by the attainment date (as prescribed in subsection (c) of this section) for Moderate Areas. The Administrator shall reclassify appropriate areas as Serious by the following dates:

(A) For areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the Administrator shall propose to reclassify appropriate areas by June 30, 1991, and take final action by December 31, 1991.

(B) For areas subsequently designated nonattainment, the Administrator shall reclassify appropriate areas within 18 months after the required date for the State's submission of a SIP for the Moderate Area.

(2) Reclassification upon failure to attain

Within 6 months following the applicable attainment date for a PM-10 nonattainment area, the Administrator shall determine whether the area attained the standard by that date. If the Administrator finds that any Moderate Area is not in attainment after the applicable attainment date—

(A) the area shall be reclassified by operation of law as a Serious Area; and

(B) the Administrator shall publish a notice in the Federal Register no later than 6 months following the attainment date, identifying the area as having failed to attain and identifying the reclassification described under subparagraph (A).

(c) Attainment dates

Except as provided under subsection (d) of this section, the attainment dates for PM-10 nonattainment areas shall be as follows:

(1) Moderate Areas

For a Moderate Area, the attainment date shall be as expeditiously as practicable but no later than the end of the sixth calendar year after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the attainment date shall not extend beyond December 31, 1994.

(2) Serious Areas

For a Serious Area, the attainment date shall be as expeditiously as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment, except that, for areas designated nonattainment for PM-10 under section 7407(d)(4) of this title, the date shall not extend beyond December 31, 2001.

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CAA § 191, 42 U.S.C.§ 7514. Plan submission deadlines

(a) Submission

Any State containing an area designated or redesignated under section 7407(d) of this title as nonattainment with respect to the national primary ambient air quality standards for sulfur oxides, nitrogen dioxide, or lead subsequent to November 15, 1990 shall submit to the Administrator, within 18 months of the designation, an applicable implementation plan meeting the requirements of this part.

(b) States lacking fully approved State implementation plans

Any State containing an area designated nonattainment with respect to national primary ambient air quality standards for sulfur oxides or nitrogen dioxide under section 7407(d)(1)(C)(i) of this title, but lacking a fully approved implementation plan complying with the requirements of this chapter (including this part) as in effect immediately before November 15, 1990, shall submit to the Administrator, within 18 months of November 15, 1990, an implementation plan meeting the requirements of subpart 1 (except as otherwise prescribed by section 7514a of this title).

CAA § 192, 42 U.S.C.§ 7514a. Attainment dates

(a) Plans under section 7514(a)

Implementation plans required under section 7514(a) of this title shall provide for attainment of the relevant primary standard as expeditiously as practicable but no later than 5 years from the date of the nonattainment designation.

(b) Plans under section 7514(b)

Implementation plans required under section 7514(b) of this title shall provide for attainment of the relevant primary national ambient air quality standard within 5 years after November 15, 1990.

(c) Inadequate plans

Implementation plans for nonattainment areas for sulfur oxides or nitrogen dioxide with plans that were approved by the Administrator before November 15, 1990, but, subsequent to such approval, were found by the Administrator to be substantially inadequate, shall provide for attainment of the relevant primary standard within 5 years from the date of such finding.